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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 503

DENVER CHICAGO TRANSPORT COMPANY, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,

Appellees.

JURISDICTIONAL STATEMENT BY APPELLANT

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DENVER CHICAGO TRANSPORT COMPANY, INC.,

Appellant,

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UNITED STATES OF AMERICA

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INTERSTATE COMMERCE COMMISSION,

Appellees.

JURISDICTIONAL STATEMENT BY APPELLANT

Appellant takes this appeal from a final order and judgment of the United States District Court for the District of Colorado, entered May 20, 1960, denying a permanent injunction and dismissing its complaint to set aside, annul, and suspend certain decisions and an order of the Interstate Commerce Commssion, hereinafter sometimes referred to as the Commission. By this Statement, filed pursuant to Rule 13 and in conformity with Rule 15 of the Revised Rules of the Supreme Court of the United States, it will be shown that this Court has jurisdiction of the appeal, and that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado from which this appeal is taken is reported at 183 F. Supp. 785, a copy of which opinion is appended hereto as Exhibit "A". No separate findings of fact or conclusions of law, apart from those contained in the opinion, were entered by the District Court. The involved decisions of the Interstate Commerce Commission, Divisions 5 and 1, are reported in 64 M.C.C. 39 and 78 M.C.C. 369, copies of which decisions are appended hereto as Exhibits "B" and "C", respectively.

JURISDICTION

This action was instituted by Appellant pursuant to 62 Stat. 931, 28 U.S.C. Sec. 1336, to set aside, annul, suspend and enjoin the operation and enforcement of two decisions and an order of the Commission. The case was heard on March 29, 1960, before a three judge court as required by 62 Stat. 970, 28 U.S.C. Sec. 2325 and as specially constituted under the provisions of 62 Stat. 968, 28 U.S.C. Sec. 2284. On May 19, 1960, the District Court issued its Memorandum Opinion and Order sustaining the involved decisions and order of the Commission, and, thereafter, on May 20, 1960, entered an Order denying the injunction sought and Judgment dismissing the Complaint. Appellant filed its Notice of Appeal in the United States District Court for the District of Colorado on July 18, 1960. On August 1, 1960, the District Court extended the time for docketing the record on appeal to October 17, 1960, and on October 6, 1960, further extended the time to October 27, 1960.

Jurisdiction in this appeal is conferred by 62 Stat. 926, 28 U.S.C. Sec. 1253. The following decisions sustain jurisdicion: *United States et al* v. *Hancock Truck Lines, Inc.*, 324 U.S. 774, 65 S.Ct. 1003, 89 L.Ed. 1357 (1945);

Interstate Commerce Commission et al v. *Hoboken Manufacturers' Railroad Co.*, 320 U.S. 368, 64 S.Ct. 159, 88 L.Ed. 107, reh.den. 321 U.S. 801, 64 S.Ct. 516, 88 L.Ed 1088 (1943); *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 59 St.Ct. 754, 83 L.Ed. 1147 (1939).

QUESTIONS PRESENTED

I.

Whether the generic commodity authorizations of "liquid petroleum products" and "petroleum products" contained in Appellant's certificates of public convenience and necessity included, at the times of their issuance, the specific commodity authorization of "crude oil" under the then definitive decisions, rules and regulations of the Interstate Commerce Commission as officially promulgated in Ex Parte MC-10, *Classification of Motor Carriers of Property*, 2 M.C.C. 703 and Motor Carrier Regulation, Section 165.2(d), 49 C.F.R. 165.2(d)?

II.

Whether at the times of issuance of Appellant's certificates of public convenience and necessity the contemporary official acts of the Interstate Commerce Commission as contained in Appellant's and other certificates of public convenience and necessity, and as contained in published decisions and orders, established a definitive agency policy and intent that the commodity "crude oil" was embraced in the generic commodity descriptions of "liquid petroleum products" and "petroleum products"?

III.

Whether, by now interpreting the scope of the commodity descriptions "liquid petroleum products" and "petroleum products" as contained in Appellant's certificates of public convenience and necessity to exclude au-

thorization to transport "crude oil", the Interstate Commerce Commission has disregarded its decisions, rules and regulations in effect at the times of issuance of the certificates, and has improperly given retroactive effect to a change in official agency policy, thereby effectuating a revocation of a portion of Appellant's certificated rights in contravention of 49 U.S.C., Section 312?

IV.

Whether, by now interpreting the scope of the commodity descriptions "liquid petroleum products" and "petroleum products" as contained in Appellant's certificates of public convenience and necessity to exclude authorization to transport "crude oil", the Interstate Commerce Commission has, under the guise of interpretive action, effected a revocation of a portion of Appellant's certificated rights and thereby deprived Appellant of due process of law?

V.

Whether the findings of the Interstate Commerce Commission are supported by substantial evidence in the record as a whole in that the Commission relies on recent evidence unrelated in time to the time of issuance of the certificates in question, and discards the evidence contemporary with and related in time to such issuance?

VI.

Whether the District Court, by equating the "substantial evidence" test with the "clearly erroneous" test, misapprehended the scope of its judicial review under the Administrative Procedure Act, and, further, unlawfully and prejudcially placed upon Appellant the improper burden of showing that the considered orders and decisions of the Interstate Commerce Commission are invalid because

they were "unjust and unreasonable" in their consequence?

VII.

Whether, under fundamental equitable considerations, the Interstate Commerce Commission should be precluded or estopped from now interpreting the commodity descriptions "liquid petroleum products" and "petroleum products", contained in Appellant's certificates, as excluding crude oil, in a manner contrary to its officially published interpretations, descriptions, definitions and regulations in effect, and relied upon, at the times when Appellant's predecessors in interest applied for and received the certificates?

STATEMENT OF THE CASE

Appellant is an interstate motor vehicle common carrier operating in several western and central states under various certificates of public convenience and necessity issued by the Interstate Commerce Commission. All of the certificates here involved authorize service in the transportation of generic classes of commodities described as either "petroleum products" or "liquid petroleum products."[1] It is the interpretation lawfully to be accorded these commodity descriptions by the Commission which is at the core of this appeal.

The present controversy had its genesis in a complaint proceeding[2] against Appellant, under its former corporate title, R. B. "Dick" Wilson, Inc., instituted before the Commission on September 9, 1954. The gist of the allegations

[1] Certificate No. MC-9895 (and its Sub-Nos. 1,7,8,53,65,68, and 74), and No. MC-89058. However, Sub-Nos. 1 and 68 were cancelled August 28, 1956 in an unrelated control proceeding before the Commission, but are listed because of their evidentiary relevance in the instant case.

[2] *Collett Tank Lines v. R.B. "Dick" Wilson, Inc.*, No. MC-C-1685.

was that Appellant had been illegally transporting "crude petroleum (petroleum crude oil)"[3] under its certificated authority to transport "petroleum products" and "liquid petroleum products." In response to the complaint, Appellant, on November 3, 1954, filed a petition with the Commission in which it sought to have the scope of its generic operating authority construed and interpreted to include the right to transport the specific commodity crude oil, or, in the alternative, that its authority be redetermined and a new commodity description specifically including crude oil be issued. The Complaint proceeding was stayed pending a decision on Appellant's petition. On June 30, 1955, the Commission, Division 5, in *R. B. Wilson Common Carrier Application*, No. MC-9895,[4] 64 M.C.C. 39 (Exhibit "B" hereto), denied the relief sought by Appellant in its petition, holding that the term "petroleum products" in the certficates did not authorize the transportation of crude oil, and that such certificates, at the times of their issuance, were not intended to authorize the transportation of crude oil.

Appellant then petitioned the Commission for reconsideration and public hearing, both of which were denied on February 15, 1956. Appellant then petitioned solely for a public hearing on the matter, and again was denied on July 24, 1956. Its administrative remedy exhausted, Appellant challenged the lawfulness of the Commission's actions by a suit filed in the United States District Court for the District of Colorado, docketed as Civil Action No. 5472, on August 31, 1956. Thereafter, on its own motion, the Commission reopened the complaint proceeding, *Collett Tank Lines v. R. B. "Dick" Wilson, Inc.*, No. MC-C-1685, 78

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[3] Hereafter, for the purpose of clarity, called "crude Oil".

[4] In this proceeding, the Commission reopened the record in each of the proceedings in which Appellant had acquired the certificates set forth in note (1) supra, to determine whether or not the authority granted was intended to include crude oil.

M.C.C. 369 (Exhibit "C" hereto), together with the proceeding in No. MC-9895, *supra* (Exhibit "B" hereto), and the other related proceedings affecting Appellant's certificates, for a consolidated oral hearing and a single report by an examiner and several joint boards. As a result of the reopened proceedings, and on the motion of the United States, the pending action in the District Court was dismissed.

On December 5, 1958, the Commission, Division 1, issued its decision (Exhibit "C" hereto), again finding that the terms "liquid petroleum products" and "petroleum products" contained in Appellant's certificates did not include crude oil and that the involved certificates were not intended, at the times of their issuance, to authorize the transportation of crude oil. Appellant's petition for reconsideration was denied by the Commission on April 10, 1959, and, thereafter, on August 27, 1959, Appellant, its administrative remedy exhausted, commenced this action in the District Court for the District of Colorado.

The District Court, three judges sitting, heard the case on oral argument on March 29, 1960. Its memorandum opinion upholding the interpretation by the Commission was issued on May 19, 1960, with judgment dismissing Appellant's Complaint entered on May 20, 1960. In its opinion, the District Court sustained the Commission's finding that the classification of carriers of petroleum products established in *Classification of Motor Carriers of Property*, 2 M.C.C. 703, 710 and the related Motor Carrier Regulation published by the Commission in 1937, served only to group motor carriers for purposes of regulation and did not establish a definitive classification of crude oil as a petroleum product. The District Court, however, recognized the doubt cast upon its conclusion by the numerous references in official reports of the Commission to the *Classification* case

as descripive of commodity authorizations. The District Court further conceded that its ruling on this point was complicated by the fact that the commodity classes set up in the *Classification* case, including that describing crude oil as a petroleum product, were published as an official Commission regulation (49 C.F.R. Sec. 165.2(d)).

References to the evidence and Commission decisions cited by Appellant to establish the interchangeable use of the terms "petroleum" and "petroleum products" by the Commission in its official decisions and orders, were found by the District Court to be unimpressive because of alleged imprecise use of language in the reports. As to cases in which the Commission had granted certificates authorizing the transportation of "petroleum products other than crude oil," the District Court, upholding the Commission, found nothing to indicate that the Commission had regarded crude oil as a petroleum product. The basis for this conclusion was that the cases relied upon had involved recommended orders of examiners or joint boards which became effective by operation of law without actual consideration by the Commission.

The District Court recognized that there had been uncertainty in the use by the Commission of the term "petroleum products" during the period within which Appellant's certificates were issued, thus distinguishing this case from the cases in which a consistent interpretation or construction by the Commission had been sustained by the courts. Although the language of the opinion is somewhat unclear (perhaps due to a typographical error in the word "propriety," rather than "impropriety," appearing at 183 F.Supp. 785, 788 of the opinion), the District Court apparently recognized that the plain language of the certificates was not determinative of the meaning of "petroleum products" and that it was therefore proper to refer to the un-

derlying proceedings in which Appellant's certificates were granted in order to determine whether the authority issued was intended to include crude oil. The Commission's finding that there had been no intent to authorize the transportation of crude oil in Appellant's "grandfather" proceeding was upheld, the Court holding that the Commission's determination of its own intent could not be said to be clearly erroneous.

It was the holding of the District Court that the action of the Commission was merely an interpretation of the commodity authorizations contained in Appellant's certificates, the Court refusing to consider Appellant's contention that the Commission, under the guise of interpretation, had improperly given retroactive operation to a policy change and thereby unlawfully effectuated a revocation of a part of Appellant's certificates in contravention of statute and due process of law.

The District Court in determining the scope of judicial review of the action of the Commission refused to discriminate between the scope of review under the Administrative Procedure Act contended for by Appellant and the "clearly erroneous" test relied upon in the opinion. In disposing of the case, the District Court held finally that Appellant had not sustained the heavy burden of showing that the action of the Commission was invalid because it was unjust and unreasonable in its consequences.

THE QUESTIONS ARE SUBSTANTIAL

In order properly to frame the perspective of this appeal, it should be first understood, as it was in the Court below, that Appellant's contentions as to the lawful interpretation of its certificates are not semantical or based on issues of technical lexicology. Nor does Appellant ask this Court merely to pass upon the sufficiency of the evidence in

support of the Commission's action. Rather, the ultimate, substantial issue raised by Appellant is whether the Commission acted arbirarily, capriciously and unlawfully in interpreting its certificates contrary to the meaning of the terms contained therein as such meaning was understood and intended by the Commission at the time of the issuance of the certificates. Therefore, on the authority of cases such as *Salvino* v. *United States et al* (D.C., Wash., 1954), 119 F.Supp. 277, and *Ace Lines, Inc.* v. *United States et al* (D.C., S.D., Iowa) decided January 25, 1960 (not officially printed), 14 Federal Carriers Cases, Para. 81, 295, it is Appellant's fundamental premise that the meaning to be given a commodity description contained in a certificate is to be determined by reference to the meaning of the terms at the time the certificate was issued. Furthermore, as recognized by this Court in *Andrew G. Nelson, Inc.* v. *United States et al*, 355 U.S. 554, 557, 78 S.Ct. 496, 2 L.Ed. 2d 484 (1958), a specialized trade usage, if shown, may change the apparently plain meaning of words used in a certificate. The *Nelson* case further indicates, lending support to the apparent rationale in *Salvino*, that the Commission's intent in issuing a certificate should be considered, among other things in evaluating the meaning of the language employed.[5] None of these points was questioned in the proceedings below, and the Commission itself went behind the face of the certificates and specifically found, in both the initial and reopened proceedings, that Appellant's certificates, at the times of their issuance, did not authorize the transportation of crude oil and were not intended to authorize the transportation of crude oil.[6] The District

[5] At 335 U.S. 554, 557-558, Note 3, this Court, at least impliedly recognizing the relevance of the Commission's intent, stated: "Although appellant offers evidence now of a grandfather operation more extensive than carriage merely for Walgreen, it seems obvious that the Commission's intent in issuing the present permit is not to be established from evidence unknown to the Commission at the time of issuance."

[6] 64 M.C.C. 39, 45; 78 M.C.C. 369, 383.

Court also conceded that there was "uncertainty" in the use by the Commission of the phrase "petroleum products," and apparently recognized the propriety of considering matters beyond the plain language of the certificates.[7] Therefore, the case would now appear to stand without serious dispute as to the frame of reference to be used in interpreting Appellant's certificates, and no further citations will be addressed herein to the proposition that the certificates should be construed in light of something more than their literal wording.

The interpretation given to Appellant's certificates by the Commission is not only clearly erroneous, but is flatly in violation of the Commission's own official rules and regulations which were in effect when the certificates were issued. In Ex Parte No. MC-10, *Classification of Motor Carriers of Property*, 2 M.C.C. 703, 710, decided August 9, 1937, the Commission, Division 5 set forth, among others, the following official classification of motor carriers:

> "*Carriers of liquid petroleum products.*—Carriers of liquid petroleum products include those carriers who transport such petroleum products as gasoline and other liquid motor fuel, road oil, *crude oil*, fuel oil, kerosene, and like products in tank vehicles or drums . . ." (Emphasis added)

The *Classification* case was in all respects a rule-making rather than an adjudicative proceeding, specifically undertaken by the Commission pursuant to the authorization of 49 Stat. 547, 49 U.S.C. 304(b). The various classifications set forth in the Commission's report, including that quoted pertaining to carriers of petroleum products, were published as official Motor Carrier Regulations in the *Federal Register*[8] and codified as such in the *Code of Federal*

[7] 183 F.Supp. 785, 788.
[8] 2 F.R. 1845, September 15, 1937.

Regulations.[9] Regulations so published and codified are deemed to be of "general applicabiliy and legal effect."[10] Such a regulation is fully binding upon the publishing agency until repealed or modified.[11] *Sheridan-Wyoming Coal Co. v. Krug*, 84 U.S. App. D.C. 288, 172 F.2d 282 (1949), reversed on other grounds, but sustained on this point, 338 U.S. 621, 70 S.Ct. 392, 94 L.Ed. 393 (1950). As a result, action by an agency such as the Commission substantially in violation of its own regulations is invalid. *Arizona Grocery Co.* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 284 U.S. 370, 52 S.Ct. 183, 76 L.Ed. 348 (1932); *Vitarelli* v. *Seaton*, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed. 2d 1012 (1959); *Sangaman Valley Television Corp.* v. *United States* (C.A., D.C., 1959), 269 F.2d 221.

The Commission, in its report in the reopened proceedings below, brushed aside the quoted language from the *Classification* case and its Motor Carrier Regulations. It was the Commission's contention that the *Classification* case merely served to group motor carriers prior to the establishment of safety, accounting, and other regulations, and that the case contained "no language which may be fairly construed as making commodity descriptions subject to the definitions set forth herein."[12] This contention, accepted by the District Court, is not only without any real support in the language of the *Classification* case, but is squarely contrary to the Commission's own statement of one of the purposes to be served by the classifications.

> "It is obvious that such classification is particularly important at this time in connection with the issuance of certificates, permits, and licenses, as it will facili-

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[9] 49 C.F. R. Sec. 165.2(d).

[10] 1 C.F.R. Sec. 11.2.

[11] Motor Carrier Regulation, Sec. 165.2(d) has never been repealed or officially modified.

[12] 78 M.C.C. 369, 380.

tate the identification and description of the operations to be covered thereby."[13]

Later in the *Classification* case, the Commission pointedly noted that a practical classification must "provide a satisfactory operating sphere for each kind and major type of carrier now in existence."[14]

In taking the position that the *Classification* case was never intended to define the scope of commodities which might be transported by the various classes of carriers set forth therein, the Commission has arbitrarily ignored its own previous decisions and orders in the many previous cases in which it granted certificates or acted on applications employing the commodity descriptions of the *Classification* case.[15] These cases, far too numerous for citation here, dating from the time of the decision in the *Classification* case and continuing until the Commission's decision in *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transportation Co., Inc.*, 48 M.C.C. 289,[16] demonstrate that, during the years in which Appellant acquired its certificates, the motor carrier industry, as well as the Commission itself, understood and intended that the *Classification* case had established certain commodity descriptions. It is certainly not contended by this that the Commission is bound by the rule of *stare decisis*. What is contended, however, is that it cannot choose to disregard a line of previous decisions

[13] 2 M.C.C. 703.

[14] 2 M.C.C. 703, 704.

[15] Representative, but not nearly exhaustive of such cases, are: *Alice Coupland Syers Common Carrier Application*, No. MC-89410, 18 M.C.C. 377, 378; *Bigsby Extension of Operations—Ohio*, No. MC-93647 (Sub-No. 1), 14 M.C.C. 339, 341; *Lundstrom Common Carrier Application*, No. MC-32882, 13 M.C.C. 491, 498; *Benjamin F. Holmes Common Carrier Application*, No. MC-94364, 12 M.C.C. 377, 378; *Consolidated Freightl Lines, Inc., Common Carrier Application*, No. MC-42487, 11 M.C.C. 131, 133-134.

[16] The *Coastal Tank Lines* case was decided June 4, 1948, nearly nine years after the *Classification* case, and, for the first time, held that the *Classification* case did not define commodity descriptions.

which, at the time, served to establish a policy of official reliance on the commodity descriptions contained in the *Classification* case (C.f. *E. Brooke Matlock, Inc.* v. *United States* (D.C., Pa., 1954) 119 F.Supp. 617; *National Labor Relations Board* v. *Guy F. Atkinson Co.*, (C.A., 9th, 1952), 195 F.2d 141).

In its initial report below, the Commission noted that none of Appellant's certificates contained any reference to the *Classification* case, and concluded that, "even if the above could be considered as a definition of the term 'petroleum products,' it would not be applicable to the certificates held by petitioner."[17] But the error of the Commission was in ignoring the effect of its Motor Carrier Regulation, Section 165.2(d), which sets forth the same definition as a regulation of "general applicability and legal effect."[18]

One further aspect of the *Classification* case and the related regulations should be considered briefly. Assuming, *arguendo*, as the Commission contends, that its intent was merely to group motor carriers for purposes of regulation and not to define commodity descriptions, the language employed nevertheless clearly evidences a then existing understanding and intent that crude oil was a petroleum product. That language is plain and unequivocal. "Carriers of liquid petroleum products include those carriers who transport *such petroleum products as* . . . crude oil (Emphasis added)."[19] It would be untenable to suppose that this language is mere inadvertent or isolated loose expression. The report in the *Classification* case emphatically negatives such a supposition by elaborating in detail the history and scope of the investigations by the Commission, the tentative drafts of the report, and the conferences with members of the motor carrier industry leading up to the

[17] 64 M.C.C. 39, 41.
[18] 1 C.F.R. Sec. 11.2.
[19] 2 M.C.C. 703, 710.

published decision, including a general conference at which "each proposed grouping of carriers was discussed in detail and the suggestions of the representatives of each such group carefully noted."[20] The inescapable conclusion is that the Commission, together with the motor carrier industry, understood and intended that crude oil was a "petroleum product."

Other decisions and orders of the Commission, corresponding generally in point of time with the *Classification* case or Appellant's grandfather proceeding, reinforce the conclusion that crude oil was then regarded as a petroleum product. In some the Commission granted "petroleum products" authority based upon a demonstrated need for crude oil transportation, or equivalently, granted a certificate for the transportation of crude oil where the application was for "petroleum products."[21] In other cases, certificates were issued for "petroleum products other than crude oil," or "petroleum products other than crude oil in its natural state."[22] In still other proceedings authority was granted by the Commission for the transportation of "refined petroleum products."[23]

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[20] 2 M.C.C. 703, 706.

[21] *Garritson & Guhrt Contract Carrier Application*, No. MC-50267, 1 M.C.C. 751; *B.V. Slater Common Carrier Application*, No. MC-105221 (Sub-No. 1), 44 M.C.C. 849 (not reported in full), 5 Fed. Carriers Cases, Para. 31012; *F.W. Crosby Contract Carrier Application*, No. MC-50183, 3 M.C.C. 563; *J.J. Stanton Extension-Rangely, Colo.–Salt Lake City, Utah*, No. MC-9787 (Sub-No. 1), 11 M.C.C. 465; *Elmer Guhrt and R.J. Garritson Extension of Operations*–No. MC-50267 (Sub.-No. 1), 12 M.C.C. 235.

[22] *H.B. Bryan Extension–Wyoming*, MC-106621 (Sub-No. 10), 47 M.C.C. 1106; *R.B. Wilson Extension–Kansas*, MC-9895 (Sub-No. 60), 47 M.C.C. 1005; *S.A. Markley and Loren G. Markley Extension–Wyoming*, MC-97264, 52 M.C.C. 876 (no printed report issued; copy of certificate received in evidence by Commission in No. MC-C-1685 as Exhibit 20).

[23] See, for example, *H. H. Edwards Contract Carrier Application*, No. MC-50050, 1 M.C.C. 741; *Earl Bray Extension of Operations – Kansas – Oklahoma*, No. MC-50115 (Sub-No. 2), 21 M.C.C. 601.

In the opinion of the District Court it was stated that the description of carriers of petroleum products contained in the *Classification* case may have been, for practical purposes, superseded by the Commission's report in *Descriptions in Motor Carriers Certificates, Ex Parte* No. MC-45, 61 M.C.C. 209, wherein a commodity description of "petroleum and petroleum products" was established.[24] But as the District Court also properly observed, the *Descriptions* case was decided long after the issuance of Appellant's certificates. Under authorities already cited, the meaning of terms in certificates is to be reckoned as of the dates of their issuance. Thus, whatever the practical effect of the *Descriptions* case, it could not be determinative of the meaning of the term "petroleum products" in Appellant's certificates.

The true significance of the *Descriptions* case is that it enunciated a change in official Commission policy with regard to the definition of commodity authority in certain certificates, including those containing a "petroleum products" authorization. In the earlier *Classification* case, the Commission had intended to establish certain classes of motor carriers and define for each a scope of commodity authorization. Contemporaneous decisions, orders, and official acts of the Commission demonstrate a reliance on the generic commodity definitions established in that case. This policy of reliance ended officially with *Coastal Tank Lines, Inc., et al* v. *Charlton Bros. Transportation Company, Inc.*, No. MC-C-870, 48 M.C.C. 289, but not until after Appellant had acquired its grandfather certificate and all but three of its certificate extensions.[25] The *Coastal Tank Lines* case, however, did not in any respect detract from the language of the *Classification* case and other decisions and

[24] 183 F.Supp. 785, 788.

[25] MC-9895 (Subs-Nos. 65, 68, 74) were acquired by Appellant subsequent to the *Coastal Tank Lines* case, but prior to the *Descriptions* case.

orders relied upon herein to show that the Commission and the motor carrier industry regarded crude oil as a petroleum product. Later, in the *Descriptions* case, subsequent to the issuance of all of Appellant's certificates, a new definition was established by the Commission which for the first time attempted to discriminate between crude oil and petroleum products.

Now, in the instant proceedings, the Commission, under the guise of its interpretative powers, has attempted to give retroactive effect to the policy determined in the *Descriptions* case, thereby effectuating a revocation of a portion of Appellant's certificated rights in contravention of 49 Stat. 555, 49 U.S.C. Sec. 312(a). In essence, this amounts to the same action by the Commission which this Court condemned in *United States et al* v. *Seatrain Lines, Inc.*, 329 U.S. 424, 67 S.Ct. 435, 91 L.Ed. 396 (1947). (c.f. *Watson Bros. Transportaton Co.* v. *United States* (D.C., Neb., 1955), 132 F.Supp. 905, aff'd per curiam 350 U.S. 927, 76 S.Ct. 302, 100 L.Ed. 810). Moreover, in Sec. 212(a) of the Interstate Commerce Act, 49 Stat. 555, 49 U.S.C. Sec. 312(a), Congress has prescribed a procedure which must be followed and a specific finding which must be made by the Commission in order to revoke a portion of a certificate; by failing to follow that procedure and make the required finding Appellant has been deprived of its property without due process of law as guaranteed by the Fifth Amendment of the Constitution of the United States.

Attention should also be turned briefly to the evidence in the reopened proceedings before the Commission. Whether Appellant's predecessor in interest actually proved a need for specific crude oil authority in its grandfather proceeding or any of the extension proceedings is not the true issue. Where, as here, a commodity such as crude oil was regarded as a petroleum product at the times

involved, grants of "petroleum products" authority nece
sarily included the right to transport all the commoditi
then embraced within the generic commodity descriptio
As this court recognized in *United States et al* v. *Caroli*
Freight Carriers Corp., 315 U.S. 475, 483-484, 62 S.Ct. 72
86 L.Ed. 971 (1942), when the evidence warrants the gra
of authority to transport a recognized or defined group
class of commodities, it is improper for the Commission
"atomize" the evidence and require proof of each speci
commodity within the classification. The Commission itse
in the *Descriptions* case, recognized that a motor carri
engaged in the transportation of petroleum produc
should not, except in certain circumstances, be restricted
the transportation of only certain petroleum products.[26]

The primary significance of the evidence introduced
the Commission proceedings below was, therefore, contra
to the apprehension of the Commission and the Distri
Court, not whether there was evidence in the grandfath
case or any of the underlying application or extension pr
ceedings which would have sustained a grant of crude
authority to Appellant, but rather, whether the evidenc
including official acts of the Commission, introduced at t
reopened proceedings, established that crude oil was
garded as a petroleum product at the times when the cer
ficates were issued. There is certainly not substantial e
dence in the record developed below to justify the Co
mission's finding that crude oil was not in fact regarded
a petroleum product. Signicantly, the affirmative eviden
relied upon by the Commission in evaluating the "tra
usage" of the term petroleum products was neither relat
in time to the issuance of Appellant's certificates nor
lated to usage in the motor carrier industry. The Comm
sion's evaluation of the trade or commercial meani
of "petroleum products" within the motor carrier indust

[26] 61 M.C.C. 209, 266.

appears to have been based upon two technical and dictionary publications of the petroleum industry,[27] the testimony adduced by a professor of chemistry of the University of Utah,[28] and two of its previous decisions cited for the principle that the Commission has always recognized the distinction between a commodity and its products.[29] In view of all the facts and circumstances, there is no substantial, rational basis in the record for the Commission's determination that Appellant's certificates, at the times of their issuance, were not intended and understood to authorize the transportation of crude oil.

Even apart from legal precedents and the statutory and constitutional curbs against the interpretation it has made, the Commission should be estopped under fundamental equitable considerations to adopt the meaning of the term petroleum products it has taken in this proceeding. Publication of its Regulation classifying carriers of petroleum products was notice to the entire motor carrier industry that the Commission at least regarded crude oil as a petroleum product. The record is clear that Appellant's predecessor in interest relied upon the terminology used by the Commission. Crude oil in substantial amounts was transported by Appellant for several years under its "petroleum products" authority, that traffic eventually accounting for twenty percent of its business in 1956 immediately prior to the hearing in the complaint proceeding against it. This instant legal action is no venture aimed at enlarging Appellant's scope of operations; it is an attempt to regain actual, substantial traffic which had been carried in good faith for many years, and to preserve the cash

[27] 78 M.C.C. 369, 377.

[28] 78 M.C.C. 369, 374, 382.

[29] 78 M.C.C. 369, 378. Despite its purportedly continuous reliance on this principle, in *Descriptions in Motor Carrier Certificates*, Ex Parte No. MC-45, 61 M.C.C. 209, 296, the Commission specifically listed "coal tar" as a commodity included within the generic description "coal tar products."

value of its certificates which have been gravely depreci ated by the action of the Commission. Whether the Com mission's regulations, past decisions, orders and officia acts created a definitive classification of crude oil as a petroleum product, or merely established a policy, prevail ing mood, or declared intent, in either case the Commissio should be now estopped from enforcing a contrary inter pretation against Appellant. (C.F. *National Labor Rela tions Board* v. *Guy F. Atkinson Co.* (C.A. 9th, 1952), 19 F. 2d 141, and cases previously cited for the proposition that the Commission is bound by its own regulations.)

Perhaps the failure of the District Court to differenti ate between the "clearly erroneous" and the "substantia evidence" tests[30] did not unduly prejudice Appellant. Tha the two tests are demonstrably different, however, wa recognized by this Court in *United States* v. *United State Gypsum Co. et al,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed 746 (1948). It is quite possible that both the "clearly erron eous" and "substantial evidence" tests might each proper ly have been applied to different aspects of the instan case. In *Andrew G. Nelson, Inc.* v. *United States et al,* 35 U.S. 554, 78 St.Ct. 496, 2 L.Ed. 2d 484 (1958), this Cour adopted the "clearly erroneous" test as applicable to th validity of the Commission's *interpretation* of the meanin of terms used in a certificate. In other cases too numerou for citation, this Court has reviewed Commission *finding* of fact under the "substantial evidence" test. In the pres ent case the Commission both interpreted Appellant's cer tificates as excluding authorization to transport crude oi and further found from the evidence before it that crud oil was not intended to be classified as a petroleum product The difficulty is that the District Court in reviewing th Commission's action saw no practical difference between th two theories of administrative review, and in excluding th

[30] 183 F. Supp. 785, 786-787.

"substantial evidence" test may also very well have failed to consider whether the Commission's findings, as distinguished from its interpretations, had substantial support in the evidence.

Of final importance is the substantial question whether the District Court improperly and prejudicially misconceived the burden of proof in this case. Specifically, error is assigned to the Court's finding that Appellant did not carry the "heavy burden" of making a convincing showing that the Commission's order was invalid because it was "unjust and unreasonable in its consequences."[31] As authority for imposing the burden of proof upon Appellant, the District Court cited *Interstate Commerce Commission* v. *City of Jersey City*, 322 U.S. 503, 512-513, 64 S.Ct. 1129, 88 L.Ed. 1420 (1944). But the *Jersey City* case involved review of the lawfulness of the Commission's order fixing a rate to be charged by a carrier. Classically, the lawfulness of a rate is judged, *inter alia*, according to whether it is "just and reasonable." But such a special criterion is not applicable to the validity of orders of the Commission, generally, nor particularly, to an order such as that involved here purporting to interpret a certificate. Nothing in the Administrative Procedure Act nor the decisions of this Court relating to the scope of judicial review of interpretative orders of the Commission justifies the imposition of the severe burden of proof conceived and applied by the District Court in this case. The transposition of the cited language from the *Jersey City* case to the facts and circumstances under review worked a substantial prejudice upon Appellant.

Premises considered, it is submitted that several questions of substantial importance are presented by this Appeal. None of the issues involved is of trivial consequence,

[31] 183 F. Supp. 785, 790.

either legally or with respect to Appellant, the Commission, or the motor carrier industry of the nation. The arguments to be advanced by Appellant in a plenary consideration of this appeal are bottomed upon a sound and meritorious foundation in law and legal theory and developed facts of record. Of cardinal significance in any disposition of this case is the needed guidance which will be furnished to the motor carrier industry and the Commission in the increasingly difficult problem of reconciling the exigencies of changing agency policies with the vested rights and privileges contained in existing certificates of public convenience and necessity.

Respectfully submitted,
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APPENDIX "A"

IN THE

United States District Court

FOR THE DISTRICT OF COLORADO

Civil Action No. 6525

DENVER CHICAGO TRANSPORT COMPANY, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant,

and

INTERSTATE COMMERCE COMMISSION,

Intervening Defendant.

Alvin J. Meiklejohn, Jr. and Leslie R. Kehl of Jones, Meiklejohn & Kilroy, Attorneys at Law, 526 Denham Building, Denver 2, Colorado, for Plaintiff.

Robert A. Bicks, Acting Assistant Attorney General, and James H. Durkin, Attorney, Department of Justice, Washington 25, D.C., and Donald G. Brotzman, United States Attorney, District of Colorado, Denver, Colorado, for Defendant.

Robert W. Ginnane, General Counsel and Carroll T. Prince, Jr., Assistant General Counsel, Interstate Commerce Commission, Washington 25, D.C., for Intervening Defendant.

MEMORANDUM OPINION AND ORDER

Before BREITENSTEIN, Circuit Judge, and KERR and ARRAJ, District Judges.

BREITENSTEIN, Circuit Judge.

Plaintiff, Denver Chicago Transport Company, Inc., sues to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission holding that the terms "liquid petroleum products" and "petroleum products" as used in certain of its certificates do not include petroleum.[1] Jurisdiction is conferred by 28 U.S.C. § 1336 and hearing by a three judge district court is required by 28 U.S.C. § 2325.

In 1954, Collett Tank Lines filed a complaint against R. B. "Dick" Wilson, Inc., to whose rights the plaintiff has succeeded, alleging that Wilson was transporting crude oil between certain points without authority. Shortly thereafter Wilson petitioned the Commission for a determination that it could transport crude oil under its authorities or that its certificates be amended to read "petroleum and petroleum products." The Collett petition was held in abeyance and on June 30, 1955, the Commission determined that the term petroleum products as used in Wilson's certificates did not authorize the transportation of crude oil.[2] Wilson sued in this court to set aside such order.[3] On its own motion the Commission then reopened the Collett complaint proceeding[4] and the Wilson application proceeding.[5] The court action was dismissed without prejudice.

Subsequently the two proceedings were consolidated and hearings held before joint boards and an examiner.

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[1] For purposes of clarity, petroleum will be referred to as "crude oil."
[2] R. B. Wilson Common Carrier Application, 64 M.C.C. 39.
[3] R. B. "Dick" Wilson, Inc., v. United States, civil action No. 5472.
[4] Docket No. MC-C-1685.
[5] Docket No. MC-9895.

The report of the Commission, filed in 1958,[6] found that the transportation of crude oil, which had been the basis of the Coliett compaint, had been discontinued and accordingly that complaint was dismissed. On the application of Wilson relating to its certificates the Commission reiterated its holding that the transportation of crude oil was not authorized. The plaintiff, which had obtained the operating rights of Wilson, then brought this suit.

The issue is the scope of the plaintiff's authorities, i.e., whether authority to transport petroleum products authorizes the transportation of crude oil. The Commission's determination thereof will not be overturned by the courts unless clearly erroneous.[7] Counsel for plaintiff criticize the clearly erroneous test and insist that the scope of judicial review is determined by § 10(e) of the Administrative Procedures Act.[8] We see no need to discuss the distinctions which are drawn. If the Commission's action violates the law or the constitution, if it is arbitrary, capricious, or an abuse of discretion, if it is based on findings which are unsupported by substantial evidence, or if the reviewing court on a consideration of the entire evidence is left with the definite and firm conviction that a mistake has been committed,[9] the action is clearly erroneous and appropriate relief should be granted.

In the ordinary use of the English language there is a distinction between a commodity and the products of that

[6] Colleti Tank Lines v. R. B. "Dick" Wilson, Inc., 78 M.C.C. 369.

[7] Andrew G. Nelson, Inc., v. United States, 355 U.S. 554, 558; Scott Truck Line, Inc. v. United States, 163 F.Supp. 118, 120.

[8] 5 U.S.C. § 1009(e).

[9] United States v. United States Gypsum Co., 333 U.S. 364, 395, rehearing denied 333 U.S. 869; United States v. Neel, 10 Cir., 235 F.2d 395, 399.

commodity.[10] In apparent recognition of this distinction plantiff's counsel state that they do not care to make an issue of technical lexicology. Instead, they urge that the present interpretation of the certificates is contrary to the meaning of the terms as intended by the Commission at the time of the issuance of the certificates.

To establish such intent plaintiff's counsel direct attention to the report of the Commission in Classification of Motor Carriers of Property etc., 2 M.C.C. 703, 710, in which the following definition appears:

> "*Carriers of liquid petroleum products.*—Carriers of liquid petroleum products include those carriers who transport such petroleum products as gasoline and other liquid motor fuel, road oil, crude oil, fuel oil, kerosene, and like products * * *."

In its report in the instant case the Commission pointed out that the certificates here involved contained no reference to the *Classifications* case or to the definition therein stated. Also the Commission said that the *Classifications* case was decided during the formative period of motor vehicle regulation and related to the grouping of carriers for the establishment of safety, accounting and other regulations. This is buttressed by a consideration of the last sentence of the liquid petroleum products categorization.

> "The group also includes carriers of edible oils, coal tar products, and chemicals, if transported in tank vehicles, but does not include the transportation of milk, fruit juices, or other perishable liquid products which require temperature control."

A reading of the entire categorization indicates an intention to set up a grouping for regulation of tank vehicles.

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[10] This distinction has been recognized, at least in later years, by the Commission. See Carl Humes (Formerly William Wrightesmith) Extension of Operations—Indiana, 48 M.C.C. 455, 457 (wire and wire products); Giles Frank Vaughan Interpretation of Certificate, 52 M.C.C. 204, 205 (cotton and cotton goods).

not to provid a definitive commodity description. However, doubt is cast upon this conclusion by numerous references which the Commission has made to the *Classifications* case when considering commodity descriptions.[11] The matter is further complicated by a Commission rule relating to types or groups of commodities in which it is said:[12]

> "Carriers of liquid petroleum products include those carriers who transport such petroleum products as gasoline and other liquid motor fuel, road oil, [crude oil?], fuel oil, kerosene, and like products in tank vehicles or drums."

It may be that for practical purposes this has been superseded by the report in Description in Motor Carrier Certificates, 61 M.C.C. 209, 263, but that report came long after the certificates in question were granted.

Plaintiff further urges that the Commission has used the terms "petroleum" and "petroleum products" interchangeably,[13] but the imprecise use of language in the reports relied upon makes the argument unimpressive. More troublesome is the terminology used by the Commission in the commodity descriptions contained in certain certificates where the authorization is for the transportation of "petroleum products other than crude oil."[14] It appears that in each of these instances the proceedings involved orders of examiners and a joint board which became effective by

[11] E.g., Alice Coupland Syers Common Carrier Application, 18 M.C.C. 377, 378; Mirto Bigsby Extension of Operations—Ohio, 14 M.C.C. 339, 3441; Benjamin F. Holmes Common Carrier Application, 12 M.C.C. 377, 378; J. G. Lundstrom, et al. Common Carrier Application, 13 M.C.C. 491, 498; Consolidated Freight Lines, Incorporated, Common Carrier Application, 11 M.C.C. 131, 133, 134.

[12] 49 C.F.R. § 165.2(d).

[13] See Walter L. Boyd Contract Carrier Application, 18 M.C.C. 278; Hutchinson Transportation Company Common Carrier Application, 19 M.C.C. 433; Dan S. Dugan Extension of Operations—Nebraska Points, 26 M.C.C. 233.

[14] H. B. Bryan Extension—Wyoming, 47 M.C.C. 1106; R. B. Wilson Extension—Kansas, 47 M.C.C. 1005; and S. A. Markley and Loren G Markley Extension—Wyoming, 52 M.C.C. 876 (not printed in full).

operation of law in the absence of exceptions which required consideration by the Commission.[15] Hence, there is no ground for concluding that the Commission intended that a grant of authority to transport petroleum products included the right to transport crude oil.

Enough has been said to indicate that there has been uncertainty in the use by the Commission of the phrase "petroleum products" in commodity descriptions. This is not a case in which there has been a consistent interpretation or construction of a descriptive phrase as was present in *Scott Truck Line, Inc.*, v. *United States, supra*, and *Arrow Trucking Co.* v. *United States*, 181 F.Supp. 775. At the same time, from the standpoint of the ordinary use of words, it cannot be said that the phrase "petroleum products" is patently ambiguous. A commodity is distinguishable from its products.

The Supreme Court has pointed out that in the absence of a patent ambiguity the Commission, in interpreting or construing an authority, will not refer to the underlying grandfather operation.[16] The propriety [impropriety?] of extending such rule to cases of uncertain intent, such as is here presented, has been recognized by the Commission in this case.[17] In its 1955 report the Commission examined the record in each of the grandfather proceedings to determine whether the authority granted was intended

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[15] 49 U.S.C. § 17(5).

[16] Andrew G. Nelson, Inc., v. United States, 355 U.S. 554, 557-558, note 3. See also Scott Truck Line, Inc., v. United States, supra, p. 133, and P. Saldutti & Son, Inc., Interpretation of Permit, 63 M.C.C. 593.

[17] This conclusion conforms with the decisions in Salvino v. United States, 119 F.Supp. 277, and Bird Trucking Co. v. United States, 159 F.Supp. 717. The Salvino case sought relief from a cease and desist order. In setting aside the Commission order the court referred to the refusal of the Commission to examine the grandfather clause proceedings to ascertain the meaning of "factory supplies" and by implication held that such examination should have been made. The Bird case involved a complaint proceedings. The court set aside the Commission order on the ground that there had not been a fair hearing and said that consideration should have been given to the commodities actually transported before June 1, 1935.

to cover crude oil,[18] and reached the conclusion that such was not the intent. When the case was reopened the Commission referred the matter to an examiner and several joint boards who received evidence as to the grandfather oprations and submitted consolidated recommendations as to findings and report. The Commission then reviewed the grandfather evidence which is summarized in its report[19] and need not be repeated here.[20]

The service of a grandfather applicant must be continuous until the hearing by the Commission.[21] Testimony

[18] 64 M.C.C. 39, 42-45.

[19] 78 M.C.C. 374-379.

[20] In concluding its consideration of the grandfather evidence, the Commission said (78 M.C.C. 378-379):

"In order for Wilson to obtain authority to transport crude oil under the 'grandfather' clause of section 206(a) of the act, it is essential for it to establish that it and its predecessor have been engaged on and continuously since June 1, 1935, in the transportation of this commodity from and to the points claimed to have been served. In this connection, the oral evidence of R. B. Wilson and his former truckdriver with respect to the operations from the previously specified Wyoming points to Berthoud and Adams City [footnote 7. Located in the Denver, Colo., commercial zone.] do not relate to a period subsequent to 1936, and R. B. Wilson admits that such operations were discontinued during that year. The certification by the Perry Petroleum Company is indefinite as to origins from which the considered traffic moved and relates to a period subsequent to the critical date, June 1, 1935. The statement of the auditor of the Wyoming Highway Department is too indefinite as to points of origin and destination to have any important probative value. Neither the oral nor documentary evidence adduced to establish 'grandfather' rights for the transportation of crude oil shows specifically described operations for the period subsequent to 1936 and prior to March 24, 1941, the date the original certificate was issued in No. MC9895. Commencement of operations after June 1, 1935, for the transportation of crude oil from and to points not served prior to that date obviously would not form a valid basis for a claim of 'grandfather' rights. It thus is clear that Wilson's predecessor, insofar as the record here shows, failed to meet the statutory requirements for the establishment of 'grandfather' rights to transport crude oil, and that denial of such authority was warranted."

[21] Gregg Cartage & Storage Co. v. United States, 316 U.S. 74, 78. There a cessation of operations for 69 days was held to sustain a conclusion by the Commission that the operations had not been continuous. See also, Loving, Copartnership v. United States, 32 F.Supp. 464, affirmed 310 U.S. 609.

of the plaintiff's predecessor shows that the service relied upon was not continuous.[22]

After considering the evidence the Commission concluded that in the grant of the authorities here involved there was no intent to include the right to transport crude oil.[23] The construction of a grandfather permit by the Commission is controlling on the courts unless clearly erroneous.[24] Here, there is substantial evidence to sustain the construction by the Commission. Its determination of its own intent cannot be said to be clearly erroneous. That intent is consistent with the literal meaning of the language used.

Counsel for plaintiff argue that the action of the Commission improperly gives retroactive operation to a policy change, is an unlawful revocation of a part of the plaintiff's authorty in contravention of 49 U.S.C. § 312, and takes away its property, i.e., the right to transport crude oil, without due process in violation of the Fifth Amendment. These contentions need not be considered. The action of the Commission was an interpretation of the rights which the plaintiff had under its certificates and was taken after a full hearing in which careful review was made of the grandfather rights. Such action was not arbitrary, capricious, or clearly erroneous. There cannot be a deprivation or revocation of that which was not granted.[25]

The Supreme Court has said that he who attacks an order of the Commission "carries the heavy burden of making a convincing showing that it is invalid because it

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[22] The following is an excerpt from the direct examination of R. B. Wilson: "Q. For how long a time or up until about what time did this transportation of crude oil from any Wyoming origin to any Colorado destination carry on? A. I think 1936, when a pipeline was built into Denver." The original certificate on No. MC-9895 was issued March 24, 1941.

[23] 78 M.C.C. 382.

[24] Andrew G. Nelson, Inc. v. United States, supra, p. 558.

[25] Arrow Trucking Co. v. United States, supra.

is unjust and unreasonable in its consequence."[28] The plaintiff has not sustained that burden and the interpretation, which the Commission, after full hearing, has placed on the authorities which it has granted, must stand.

This opinion sufficiently states the findings of fact and conclusons of law of the court. Further findings of fact and conclusions of law are unnecessary. The clerk will prepare and submit a judgment denying the injunction and dismissing the case.

DATED at Denver, Colorado, this 19th day of May, A.D. 1960.

JEAN S. BREITENSTEIN, Circuit Judge
United States Court of Appeals

EWING T. KERR, Judge
United States District Court

ALFRED A. ARRAJ, Judge
United States District Court

[28] Interstate Commerce Commission v. City of Jersey City, 322 U.S. 503, 512-513.

APPENDIX "B"

INTERSTATE COMMERCE COMMISSION

No. MC-9895[1]

R. B. WILSON COMMON CARRIER APPLICATION

Decided June 30, 1955

Upon reconsideration, found that the term "petroleum products" as used in the certificates issued in these proceedings does not authorize the transportation of petroleum and that such certificates, at the time of the grant thereof, were not intended to authorize the transportation of petroleum. Prior reports, 10 M.C.C. 802, 10 M.C.C. 810, 21 M.C.C. 806, 23 M.C.C. 261, 27 M.C.C. 831, 31 M.C.C. 803, 46 M.C.C. 811, 49 M.C.C. 819, and 52 M.C.C. 853.

Appearances as shown in the prior reports and, in addition, *James K. Knudson* for an interested party.

REPORT OF THE COMMISSION ON RECONSIDERATION

Division 5, Commissioners Cross, Tuggle, and Hutchinson By Division 5:

This report deals with a petition for construction, interpretation, and, if necessary, modification of certificates

[1] This report also includes Nos. MC-9895 (Sub-No. 1), R. B. Wilson Colorado-Kansas-Wyoming Extension of Operations, MC-9895 (Sub-No. 7), R. B. Wilson Extension of Operations; MC-9895 (Sub-No. 8), R. B. Wilson—Extension of Operations—Evergreen, Colo.; MC-9895 (Sub-No. 53), R. B. Wilson Extension—Wyoming Refineries; MC-9895 (Sub-No. 65), R. B. Wilson Extension—Nebraska; MC-9895 (Sub-No. 68), R. B. Wilson Extension—Rangely; MC-9895 (Sub-No. 74); R. B. Wilson Extension—South Dakota Points; and MC-89058, C. E. Mock Common Carrier Application

heretofore issued in these proceedings to R. B. "Dick" Wilson, Inc., of Denver, Colo., hereafter called petitioner.

Upon consideration of a petition filed November 5, 1954, by petitioner, to which Collett Tank Lines, hereafter called Collett, replied, and of the records herein, by order entered March 10, 1955, we reopened these proceedings for reconsideration on the present records and denied the petition in all other respects, with one exception not here material.

Petitioner is the successor-in-interest to the operating rights formerly held by others which rights were acquired by petitioner with the approval of this Commission. A portion of the rights so acquired were issued pursuant to a timely filed application under the "grandfather" clause of section 206(a) of the Interstate Commerce Act. Petitioner contends that its predecessor did, from the inception of his operations prior to June 1, 1935, transport crude oil as well as various types of refined petroleum products in interstate commerce; and that it and its predecessors have continued to transport such commodities. It submits that, until recently, no one questioned its right to transport crude oil under the commodity description "petroleum products"; and that it has been assured informally by certain officials of our Bureau of Motor Carriers that "petroleum products" was formerly construed to include crude oil. Petitioner points out that there is now pending a complaint, No. MC-C-1685, filed by Collett challenging petitioner's right to transport crude oil under its certificates authorizing the transportation of petroleum products.

Petitioner also submits that its predecessor, R. B. Wilson, did, in "numerous" applications, seek territorial extensions to transport petroleum products under the belief

[2] By our order of March 10, 1955, reopening the proceedings included herein for reconsideration on the present record, it was also ordered that "no further action be taken at this time respecting the complaint."

that such commodity description included crude oil; and that in each case in which the application was granted, the term "petroleum products" was used, with the exception that in No. MC-9895 (Sub-No. 60), now embraced in certificate No. MC-9895, the commodity description "petroleum products, other than crude oil in its natural state" was used. In further support of its argument, petitioner submits (1) that in filing its application in No. MC-9895 (Sub-No. 78), the commodity description "petroleum and petroleum products" was employed, and that it was so granted; and (2) that in filing its application in No. MC-9895 (Sub-No. 79), it sought "petroleum and petroleum products," but that only "petroleum products" were granted. It is, thus, petitioner's position that, until approximately 1947, it was the view of the Commission that crude oil was included in the term "petroleum products," and that all of the grants of authority in these proceedings were made under that theory.

With the possible exception of the two cases hereinafter discussed, we know of no decision of this Commission which could even be interpreted as holding that authority to transport "petroleum products" includes the right to transport "petroleum" or "crude oil." The Petroleum Dictionary, pubished by the University of Oklahoma Press, defines crude oil as "Petroleum; designated *crude* to distinguish it from the refined oils manufactured from it." And in the Illustrated Petroleum Dictionary and Products Manual, published by the Petroleum Educational Institute, petroleum is defined as, "Petroleum. Describes crude oil as it comes from the ground in its natural state or when secured from coal shale and other sources." On the other hand, the term "petroleum products" means any and all products derived from petroleum. See *Descriptions In Motor Carrier Certificates*, 61 M.C.C. 209, 265, 266. That we have always made a distinction between a commodity and

the products of that commodiy is evident from other cases. For example, in *Humes Extension of Operations—Indiana*, 48 M.C.C. 455, the Commission division 5, concluded that applicant therein, who held authority to transport "wire produes," was not authorized to transport "wire," and stated (page 47) that "Wire products describes commodities of a definite type or class, that is, articles made principally out of wire." And in *Vaughan Interpretation of Certificate*, 52 M.C.C. 204, the Commission, division 5, in finding that authority to transport "cotton and cotton goods" included authority to transport "cotton yarn," stated (page 205):

> The use of the two expressions "cotton" and "cotton goods" shows an intent to grant authority to transport both the raw material and finished products thereof.

As stated, there are two cases which could possibly be used as a basis for petitioner's contention that authority to transport "petroleum products" includes the right to transpor "petroleum." One is *Classification of Motor Carriers of Property*, 2 M.C.C. 703, and the other is No. MC-9895 (Sub-No. 60).

> In the former case, division 5 said, at page 710:
> "*Carriers of liquid petroleum products.*—Carriers of liquid petroleum products include those carriers who transport such petroleum products as gasoline and other liquid motor fuel, road oil, crude oil, fuel oil, kerosene, and like products * * *."

None of peitioner's certificates, however, contains any reference to the above-cited case. In the circumstances, even if the above could be considered as a definition of the ferm "petroleum products," it would not be applicable to the certificates held by petitioner. See *Coastal Tank Lines, Inc.*, v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289, 296.

In each of the proceedings included herein, petitioner now holds a certificate authorizing the transportation, as here pertinent, of "petroleum products." It here seeks (1) an order declaring that under the authorities it now holds it may transport "petroleum," or (2) a redetermination of the authorities heretofore issued to it in these proceedings and the substitution of the commodity description "petroleum and petroleum products" for "petroleum products." In the circumstances, we need not describe the territorial scope of the authorities held except to the extent that it may aid in determining whether the term "petroleum produes" as used in the certificates originally issued herein was intended to include "petroleum."

Petitioner points out that its predecessor was issued a certificate in No. MC-9895 (Sub-No. 60), authorizing the transportaion of "Petroleum products, other than crude oil in its natural state." The argument is advanced that at the time of the issuance of that certificate (1947) it was "still the conclusion of the Commission and its staff that the term 'petroleum products' included crude oil, otherwise there would have been no point in restricting the petroleum products authority against crude oil in its natural state." This argument in our opinion is without merit and we know of no such conclusion. In the proceeding in No. MC-9895 (Sub-No. 60), authority was sought to transport "Petroleum products, other than crude oil in its natural state," the examiner recommended that the authority sought be granted, and his order became effective as the order of the Commission on October 13, 1947. The so-called exception "other than crude oil in its natural state" is of no value and could well have been excluded from the certificate as contributing nothing. Crude oil in its natural state is not a petroleum product and does not become such merely by the use of the indicated language.

As heretofore stated, petitioner points out that it sought authority in No. MC-9895 (Sub-No. 79) to transport petroleum and peroleum products, but that only petroleum products was authorized. That application was the subject of a report and order by a joint board, served April 26, 1954, in which the joint board concluded "No need has been shown for the transportation of petroleum and to that extent the application should be denied." The recommended order of the joint board became effective as the order of the Commission on May 17, 1954.

In view of the foregoing, we conclude that the term "petroleum products" as used in the certificates issued to petitioner in these proceedings does not authorize the transportation of petroleum. There remains for consideration petitioner's request that we reexamine the record in each of the proceedings included herein to determine whether or not the authority granted was intended to cover petroleum. Each of the proceedings will be separately discussed.

No. MC-9895.—By this timely filed "grandfather" clause application, authority was sought to transport "peroleum products," over regular routes, from and to certain points in Colorado, Kansas, and Wyoming. On March 24, 1941, a certificate was issued to petitioner's predecessor auhorizing the transportation of "liquid petroleum products," over regular routes, from El Dorado, Kans., to Fort Collins and Greeley, Colo., serving certain intermediate points; from Casper Wyo., to Denver, Colo., serving Berthoud, Colo., as an intermediate point; and from Denver, Colo., to Laramie, Wyo., serving no intermediate points. Petitioner calls attention to two documents submitted by its predecessor which petitioner contends supports the claim that its predecessor was engaged in the transportation of petroleum on and prior to June 1, 1935. They are (1) a certification by the Perry Peroleum Company, dated

December 3, 1936, and (2) a statement from an auditor and inspector of the Wyoming Highway Department, dated June 9, 1936. The petroleum company certified that petitioner's predecessor transported shipments of "petroleum and petroleum products" for it from August 1935 to December 3, 1936, from points in Wyoming to Adams City, Colo. The auditor's statement covered the period from March 1, 1935, to June 1, 1936, and shows that petitioner's predecessor made an adjustment in the tax due Wyoming because the predecessor "has been reporting six pounds per gallon on crude and six on gasoline. Should have been seven and one half on crude and six point six on gasoline."

Before an applicant may be found entitled to "grandfather" rights under section 206(a) of the act, it must establish that it was in bona fide operation on June 1, 1935, and that it has so operated since that time. The petroleum company's certification does not establish "grandfather" rights as there is no showing that such service was rendered on June 1, 1935, and the certificate issued March 24, 1941, does not authorize any service to Adams City. The auditor's statement does not cover the period beyond June 1, 1936. It is noted that other proof submitted by petitioner's predecessor in support of the claimed "grandfather" rights related solely to the transportation of "petroleum products" for the period from prior to June 1, 1935, to January 1937. We have examined all the proof submitted in support of the "grandfather" rights claimed in No. MC-9895 and conclude that petitioner, as successor-in-interest to applicant, is not entitled to any rights other than those set forth in the certificate which it now holds.

No. MC-9895 (Sub-No. 1).—In this proceeding, authority was sought to transport "petroleum products," in bulk, in tank trucks, from specified points, consisting of named communities and of the Texas Company's refineries, to

unnamed points in specified States. The authority sought, insofar as commodities are concerned, was granted. The application was supported by the Texas Co., the Eldorado Refining Co., and three gasoline and oil retail distributors. The first two shippers expressed a need for service from refineries to utimate consumers, such as contractors and retail dealers. The distributors expressed a need for service from places of distribution to their garages. No mention of crude oil was made in this record.

No. MC-9895 (Sub-No. 7).—By this application, authority was sought to transport "petroleum products," in bulk, between refineries and loading points at specified points and points in named States. The application, commoditywise, was granted. Although several refined petroleum products were named, crude oil was not mentioned in this record. The need expressed was for transportation from refineries to ultimate consumers.

No. MC-9895 (Sub. No. 8).—Authority was here sought to transport "bulk petroleum products" from Craig, Colo., and Casper, Wyo., to named points in specified States. The application, commoditywise, was granted as requested. The basis of this application was a desire to use routes which were passable during winter months. The application was supported by the Texas Co., whose support was premised on a desire and a need for service from refineries to ultimate consumers. No mention was made of crude oil.

No. MC-9895 (Sub-No. 53).—By this application, authority was sought to transport "petroleum products," in bulk, from refineries and loading points in named States to points in portions of specified States. This application, insofar as commodities are concerned, was granted. No menton was made of crude oil. The need expressed was for the transportation of petroleum products from refineries to points of ultimate consumption, and between refineries.

No. MC-9895 (Sub-No.65).—Authority was here sought to transport "petroleum products," in bulk, in tank trucks, (1) between points in Colorado, traversing Utah for operating convenience, (2) between points in Colorado, on the one hand, and, on the other, points in Utah, (3) from all loading and refining points in Colorado to points in Nebraska and Kansas and (4) from all loading and refining points in Wyoming to points in Nebraska. The supporting evidence, within the scope of the application, related entirely to a need for service from refineries and pipelines to ultimate consumers, and the only specific commodities named were gasoline, aviation gasoline, and liquefied petroleum gas. In addition to evidence within the scope of the application, a representative of Phillips Petroleum Company stated that his company would have an occasional movement of crude oil from wells in the vicinity of Rangely, Colo., to a pipeline at Wamsutter, Wyo.[3] The application was granted, as filed, except for some modification not here pertinent.

No. MC-9895 (Sub-No. 68).—In this proceeding, authority was sought to transport "petroleum products," in bulk, from Rangely, Colo., and points within 10 miles thereof, to points in Idaho. The application, commoditywise, was granted. The only evidence as to a need for service was for transportation from the shipper's new recycling plant, or refinery, at Rangely, to refineries in Idaho. No mention was made of crude oil.

No. MC-9895 (Sub-No. 74).—The authority sought herein was to transport "petroleum and petroleum products," in bulk, from points in Colorado and Wyoming to points in a described area of South Dakota. The authority granted was to transport "petroleum products," in bulk, from specified points in Colorado to points in a described area of South Dakota. The supporting shipper, the Texas

[3] It should be noted that no authority was sought to transport crude oil or to operate from any Colorado point to any point in Wyoming.

Co., expressed a need for service from distribution points, such as refineries and pipeline terminals to bulk plants, distributors, and contractors. The shipper named several commodities, but did not mention crude oil.

No. MC-89058.—By this application, authority was sought to transport "petroleum products" from named points in specified States to points in described areas of certain States. The application was granted insofar as commodties are concerned. The application was supported by the Texas Co., and was confined to a showing of need from bulk storage points to ultimate consumers, such as service stations and contractors. No mention was made of crude oil.

As seen, the only evidence adduced in any of the extension proceedings pertaining to the transportation of crude oil was in No. MC-9895 (Sub-No. 65). Tha evidence, however, related solely to movements from a certain area in Colorado to a point in Wyoming, whereas no authority was even sought to operate from any Colorado point to any point in Wyoming. Not only was crude oil not mentioned in any of the other extension proceedings included herein, but the type of movement involved in each such proceeding was for delivery to ulimate consumers. As far as we know, ultimate consumers do not use crude oil. At least, there is nothing in any of the records herein to indicate otherwise. In the circumstances, we conclude that the findings in each of the extension applications were not intended to authorize the transportation of petroleum.

Upon reconsideraion, we find that the term "petroleum products" as used in the certificates issued in these proceedings does not authorize the transportation of petroleum, and that such certificates, at the time of the grant thereof, were not intended to authorize the transportation of petroleum.

No order appears to be necessary.

APPENDIX "C"

INTERSTATE COMMERCE COMMISSION

No. MC-C-1685[1]

COLLETT TANK LINES v.

R. B. "DICK" WILSON, INC.

Decided December 5, 1958

1. In No. MC-C-1685, found that operations conducted by defendant from Ashley Valley, Utah, to Rangely, Colo., have been discontinued. Complaint dismissed.

2. In Nos. MC-9895 and subnumbers 1, 7, 8, 53, 65, and 68 and MC-89058, found that the terms "liquid petroleum products" and "petroleum products" as used in the certificates issued therein do not include petroleum and that such certificates at the time of the grant thereof were not intended to authorize the transportation of petroleum.

James K. Knudson for complainant in No. MC-C-1685 and for protestant in the proceedings described in footnote 1.

[1] This report also embraces Nos. MC-9895, R. B. "Dick" Wilson, Inc., Interpretation of Certificate, MC-9895 (Sub-No. 1), R. B. Wilson Colorado-Kansas-Wyoming Extension of Operations, MC-9895 (Sub-No. 7), R. B. Wilson Extension—WyomingColorado, MC-9895 (Sub-No. 8), R. B. Wilson Extension of Operations—Evergreen, Colo., MC-9895 (Sub-No. 53), R. B. Wilson Extension—Wyoming Refineries, MC-9895 (Sub-No. 65), R. B. Wilson Extension—Nebraska, MC-9895 (Sub-No. 68), R. B. Wilson Extension—Rangely, and MC-89058, C. E. Mock Common Carrier Application. The certificate issued in No. MC-89058 to C. E. Mock on April 3, 1939, was transferred to R. B. Wilson pursuant to an order of the Commission, division 5, on April 8, 1941, was subsequently incorporated in successive consolidated certificates in No. MC-9895 issued to R. B. Wilson, and was later transferred with certificates granted in the seven other R. B. Wilson proceedings to R. B. "Dick" Wilson, Inc., under No. MC-FC-50906.

Marion F. Jones and *Alvin Meiklejohn, Jr.*, for defendant in No. MC-C-1685, and for applicant in the proceedings described in footnote 1.

Frank H. Shafroth for intervener in all proceedings.

REPORT OF THE COMMISSION

Division 1, Commissioners Hutchinson, Walrath, and Webb By Division 1:

The Commission, by order dated November 1, 1956, reopened these proceedings on its own motion for consolidated oral hearing. They were so heard, and were the subject of a single report by several joint boards and an examiner. They involve related issues and will be disposed of in a single report.

Exceptions to the order recommended by the boards and the examiner were filed by R. B. "Dick" Wilson, Inc.,[2] hereinafter called Wilson, defendant in the title proceeding and also successor to the original applicants in the remaining eight proceedings, and a reply was filed by Pacific Intermountain Express Co.,[3] successor to Collett Tank Lines, hereinafter called Collett, complainant in the title proceeding and also protestant in the remaining proceedings.

In the title proceeding, by complaint filed September 9, 1954, complainant, Collett, a corporation of Salt Lake City, Utah, and a common carrier by motor vehicle, alleges that defendant Wilson, of Denver Colo., has been transporting

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[2] The Commission, division 4, in No. MC-F-6742, by order of March 5, 1958, authorized the merger into Denver Chicago Trucking Company, Inc., of the operating rights and property of R. B. "Dick" Wilson, Inc. By order of July 24, 1958, the period within which such transaction may be consummated was extended to January 2, 1959.

[3] The Commission, division 4, in No. MC-F-5984, by order of February 16, 1956, as supplemented, authorized the merger into Pacific Intermountain Express Co. of the operating rights and properties of Collett Tank Lines.

and holding out to transport in interstate commerce as a motor common carrier, petroleum, in bulk, in tank vehicles, from Ashley Valley, Utah, to Rangely Colo. without proper authority therefor contained in its certificates and is, therefore, in violation of certain provisions of the Interstate Commerce Act. Complainant requests that an order be entered by this Commission requiring defendant to cease and desist from the alleged unauthorized transportation and that other appropriate action be taken if defendant fails to comply with the terms of such an order.

In No. MC-9895, a "grandfather" proceeding, and the seven other application proceedings, the original applicants, R. B. Wilson and C. E. Mock, sought and were granted authority to transport liquid petroleum products and petroleum products, in bulk, in tank vehicles, over regular and irrgular routes, from, to, and between certain points in Colorado, Wyoming, Utah, Idaho, South Dakota, Nebraska, and Kansas which need not be more specifically described. Wilson, who now holds auhority granted in these proceedings, seeks to establish that the certificates issued to its predecessors in the considered application proceedings, authorizing the transportation of liquid petroleum products and petroleum products, included authority to transport crude oil or petroleum. For convenience, the considered commodity hereinafer will be referred to mainly as crude oil. The transportation of crude oil by Wilson from points in Ashley Valley to Rangely, which is in issue in the title proceeding, was performed under a certificate granted in No. MC-9895 (Sub-No. 65).

The historical circumstances resulting in the setting of these proceedings for consolidated oral hearing will be first discussed. By order of September 24, 1954, the handling of the title proceeding under the modified procedure was authorized. Thereafter, by petition dated November 3,

1954, defendant requested that the complaint in that proceeding be held in abeyance until this Commission had determined the issues presented in another petition concurrently filed in No. MC-9895 and the related application proceedings to determine the scope of authority commoditywise held by it, or, in the alternative, the scope of the authority commoditywise which should have been granted to its predecessors. In the latter petition Wilson asserted that certificates issued to its predecessors authorized the transportation of liquid petroleum products and petroleum products, in bulk, in tank vehicles; that under No. MC-9895 crude oil has been transported, in addition to refined petroleum products, since prior to June 1, 1935, which operation warranted a grant that would allow transportation of crude oil and other petroleum products under the "grandfather" clause of section 206(a) of the Interstate Commerce Act; that no question was raised as to the right to transport crude oil under the various certificates issued to it or its predecessors authorizing the transportation of petroleum products and liquid petroleum products until about 1951 when Wilson was informed by our Bureau of Motor Carriers that necessary action would be instituted by the Bureau to resolve this issue; that by September 1954, when the considered complaint was filed, no such determination had been made; and that this Commission should either determine that the commodity descripions "petroleum products" and "liquid petroleum products" include crude oil or that the commodity descriptions in Wilson's certificates should be amended to substitute the commodity description "petroleum and petroleum products" for those referred to above.

Prior to this Commission's consideration of the described petitions, complainant filed a primary statement of complaint supported by a verified statement and certified copies of pertinent documents under the modified proced-

ure. However, before a determination was made under this procedure, the Commission, former division 5, on March 10, 1955, pursuant to the described petitions of November 3, 1954, reopened the proceedings in Nos. MC-9895 and sub-numbers 1, 7, 8, 53, 65, 68, and 74[4] and MC-89058 for reconsideration on the present record and postponed action with respect to the complaint proceeding. In the report on consideration in *Wilson Common Carrier Application*, 64 M.C.C. 39, hereinafter referred to as the *Wilson* case, embracing the abovenumbered application proceedings, it was found that the term "petroleum products" as used in the certificates issued therein does not authorize the transportation of petroleum; and that such certificates, at the time they were granted, were not intended to authorize the transportation of petroleum.

Thereafter, on August 15, 1955, Wilson filed another petition, among other pleadings not pertinent here, in which it requested that No. MC-9895 and related proceedings be reheard and that the entire Commission reconsider the aforementioned report on reconsideration in the *Wilson* case and declare that the certificates issued prior to October 20, 1952,[5] authorizing the transportation of petroleum products, include authority to transport petroleum. This petition was denied by the entire Commission on February 15, 1956. Subsequently, however, upon consideration of the records in the involved proceedings, and good cause appearing therefor, the entire Commission, on its own motion, on November 1, 1956, reopened the complaint proceeding and the application proceedings which are the

[4] No. MC-9895 (Sub-No. 74) was not included among the nine proceedings considered herein when they were reopened for oral hearing. Wilson's predecessor in the No. MC-9895 (Sub-No. 74) proceeding sought authority to transport petroleum as well as petroleum products but received authority to transport only petroleum products.

[5] The date of the decision in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 and 766, hereinafter referred to as the *Descriptions* case.

subject of this report for consolidated oral hearing. The Commission's order reopening these proceedings for oral hearing did not vacate the denial order of February 15, 1956.

Wilson has an application pending in No. MC-9895 (Sub-No. 83) requesting authority to transport petroleum from and to points generally authorized to be served in certificates issued in the application proceedings which are the subject of this report. In *R. B. "Dick" Wilson, Inc., Extension—Petroleum*, 68 M.C.C. 169, the Commission, division 1, found that public convenience and necessity require operation by Wilson as a common carrier by motor vehicle, of crude petroleum, in bulk, in tank vehicles, (1) between points in Moffat and Rio Blanco Counties, Colo., (2) between points in Moffat and Rio Blanco Counties, on the one hand, and, on the other, points in Uintah County, Utah, (3) between points in that part of Colorado north of U.S. Highway 36 and east of U.S. Highway 85, and (4) from points in such described Colorado territory to points in Kimball County, Nebr., over irregular routes. A certificate has not been issued in this procedeing, and a petition filed by Coilelt for reconsideration is now pending.

Following the consolidated oral hearing in the proceedings involved herein, a consolidated recommended report and order was issued by an examiner and several joint boards. Their recommended findings are next set forth. In No. MC-C-1685, the examiner found that the complaint with respect to operations conducted by Wilson between Ashley Valley and Rangely became moot by reason of discontinuance of such operations and recommended that the complaint be dismissed. In No. MC-9895, the joint board found that Wilson had failed to establish that it is entitled to transport petroleum, in interstate or foreign commerce, as a common carrier by motor vehicle under the

so-called "grandfather" clause provisions of section 206 (a) of the act, and that Wilson's petition filed August 15, 1955, for reconsideration and rehearing, should be denied. In Nos. MC-9895, subnumbers 1, 7, and 8, the joint boards found, and in No. MC-9895, subnumbers 53, 65, and 68, and MC-89058, the examiner found that the term "petroleum products," as used in the certificates issued in these proceedings, does not authorize the transportation of petroleum, and that such certificates at the time of the grant thereof were not intended to authorize the transportation of petroleum.

Wilson excepted to the findings of the examiner and joint boards contending (1) that when the considered "grandfather" and extension applications were filed the intent was to obtain authority to transport crude oil as well as refined petroleum products, (2) that this Commission when granting authority in these proceedings intended to authorize the transportation of crude oil as a commodity included within the term "petroleum products," and (3) that the commodity transported by it from oilfields is a petroleum product. In reply, Collett asserts (1) that Wilson has failed to establish that it should have been granted "grandfather" authority to transport crude oil or to show a need for the transportation of this commodity in any of the considered extension applications, (2) that this Commission has always recognized the distinction between petroleum and petroleum products and has granted authority to transport crude oil when needed, and (3) that the commodity in question is the raw commodity from which petroleum products are produced.

The evidence, the boards' and the examiner's recommendations, the exceptions, and the reply thereto have been considered. We find the statement of facts by the examiner and the boards, as modified herein, to be correct and adopt such statement as our own.

With respect to the complaint, evidence was presented by complainant showing that its predecessor, Nelson Tank Lines, Inc., hereinafter called Nelson, was regularly engaged in the transportation of crude oil from Ashley Valley to a pipeline terminal near Rangely for the Utah Oil Refining Company between October 1950 and January 28, 1952. The volume of this traffic during 1951 amounted to 41,638,108 gallons, producing a gross revenue of $217,632. This transportation was performed under authority granted to Nelson's predecessor in No. MC-105027 (Sub-No. 20) covering the transporation, over irregular routes, of petroleum and petroleum products, in bulk, in tank trucks, (1) from points in Utah to points in Colorado west of U.S. Highway 87 and points in Wyoming and (2) from points in Colorado west of U.S. Highway 87 to points in Utah and Wyoming. The shipper, however, discontinued using Nelson's service on January 28, 1952, and began using that of defendant in lieu thereof. Defendant's operation was performed under a portion of its authority in No. MC-9895 (Sub-No. 65) which authorizes the transportation, so far as pertinent, of petroleum products, in bulk, in tank vehicles, between points in Colorado, on the one hand, and, on the other points in Utah, over irregular routes. Complainant subsequently purchased the operating rights held by Nelson and was issued a certificate embracing such rights on September 29, 1952. Defendant continued to perform the considered operation until the fall of 1956. At that time complainant, which had previously filed its complaint on September 9, 1954, recovered the movement of the traffic.

Evidence adduced by complainant and defendant discloses that the application in which Nelson's predecessor, for convenience referred to hereinafter as Nelson, obtained authority to render the service discussed in the preceding paragraph in No. MC-105027 (Sub-No. 20) was heard on the same date as Wilson's application in No. MC-9895

(Sub-No. 65). The former application was filed on September 20, 1948, and the latter on June 14, 1948. Both applications were signed by the same counsel who also represented both applicants at the hearings on November 3, 1948. The Nelson application in No. MC-105027 (Sub-No. 20) sought authority to transport petroleum and petroleum products. The Wilson application in No. MC-9895 (Sub-No. 65) sought authority to transport only petroleum products. In the Nelson application, a representative of Nelson adduced evidence that there was production and oil well drilling in Utah; that when an oil well went into production, crude oil must be transported by trucks to a pipeline connection or refinery until a pipeline from the well is constructed; and that this applicant proposed to render such service between points in Utah and Colorado. The only shipper evidence adduced in that proceeding was the incorporation by reference of the testimony of representatives of three oil companies previously adduced by them in the Wilson proceeding. Their evidence also constituted the only shipper evidence in the Wilson proceeding. The evidence of only one of these witnesses, a representative of Phillips Petroleum Company, related to the transportation of crude oil. This evidence was to the effect that there was a movement of crude oil from the Rangely field in Colorado to a pipeline at Wamsutter, Wyo.; that Nelson was then handling this movement for Phillips; and that there was a need for such service on a permanent basis. This shipper evidence was not pertinent to any authority sought in the Wilson application but was pertinent to authority sought in the Nelson application.

The remaining evidence of complainant consists of oral evidence adduced by a professor-chemist of the University of Utah relative to the issue of whether authority to transport petroleum products includes authority to transport crude oil or petroleum. Since the evidence of this

witness was presented by complainant on this point in chief in the complaint proceeding and on rebuttal in the application proceedings, it will be summarized following the discussion of the evidence adduced by Wilson in the application proceedings.

Wilson presented evidence by its predecessor, R. B. Wilson, a truck-driver formerly employed by R. B. Wilson, Wilson's traffic manager, and representatives of three oil companies. In this connection, R. B. Wilson began transporting petroleum and petroleum products in about 1933 or 1934 between points in Kansas and Colorado and between points in Wyoming and Colorado. "Finished products" were transported from Kansas. In 1934 he began transporting crude oil from Lusk, Wyo., to Adams City, Colo., for the Perry Petroleum Company refinery, and the movement was continued for over a year. During that time he also transported some crude oil from Salt Creek, Wyo., Casper, Wyo., and a field south of Medicine Bow, Wyo., to a refinery near Berthoud, Colo. The movement from the Wyoming origins to the Colorado points continued until sometime in 1936 "when a pipeline was built into Denver." Tank trailers are used to transport crude oil from an oilfield to a refinery or pipeline connection until a pipeline is built to the field. Wilson asserts that since prior to June 1, 1935, he has held out to transport, solicited, and handled crude oil whenever there was a movement available, but did not identify any such movements as to time and points of origin and destination, except to the extent outlined above. He filed an application for authority to continue his so-called "grandfather" operations and submitted documentary proof of past operations in support of his claim for "grandfather" rights. Like many similar applications, this application was processed informally in conferences with a field representative of our Bureau of Motor Carriers. The only portion of the documentary proof pertinent

herein consisted of a written certification by Perry Petroleum Company that R. B. Wilson had transported shipments of petroleum and petroleum products for it from August 1935, to December 3, 1936, from points in Wyoming to Adams City, and a statement by an auditor of the Wyoming Highway Department dated June 9, 1936, showing that R. B. Wilson during the period from March 1, 1935, to June 1, 1936, made an adjustment in tax due Wyoming because the weight of 6 pounds per gallon had been reported on "crude" whereas the weight should have been 7.5 pounds. R. B. Wilson asserts that he did not complain when the certificate issued to him in the "grandfather" proceeding authorized only the transportation of petroleum products because he thought that crude oil was a petroleum product and the operation from Ashley Valley to Rangely was instituted under the same belief. He does not know of any crude oil which has been picked up in his operation which was not subjected to the heater-treater process hereinafter described.

A former truckdriver presented oral evidence that he drove a truck for Wilson and transported crude oil from Lusk to Adams City during the period from December 1935 to July 1936; that such transportation was being performed by Wilson at least 6 months prior to December 1935; and that in July 1936 he was assigned to haul gasoline and another driver replaced him in the crude oil haul.

A representative of Wilson who was its assistant traffic manager from 1953 to 1956, and who thereafter became its traffic manager, asserted that Wilson, on February 1, 1957, operated about 30 tank trailers allocated to the transportation of crude oil; that approximately 20 percent of its traffic during 1956 consisted of crude oil; and that Wilson had transported this commodity from and to points on its exhibit 4 of record. This exhibit shows that for the periods hereinafter enumerated Wilson transported crude

oil as follows: during 1952, 1953, 1954, 1955, and 1956 from Ashley Valley to Rangely 4,327,616 barrels; during 1952 and 1953 from Red Wash, Utah, to Rangely 385,954 barrels; during 1955 and 1956 from Rangely field, Colo., to Jensen, Utah, 721,024 barrels; during 1951, 1952, and 1953 from Julesburg Basin in northeastern Colorado to Northport, Nebr., 1,058,182 barrels; during 1953, 1954, 1955, and 1956 from Julesburg Basin to Sterling, Colo., 3,583,104 barrels; during 1955 and 1956 from Julesburg Basin to Merino, Colo., 1,687,264 barrels; and during 1954, 1955, and 1956, from points in Moffat and Rio Blanco Counties, Colo., to Iles Grove Station, Colo., 386,110 barrels. This witness recalls searching for additional records showing transportation prior to 1951 and found none. He also interviewed a former employee of Wilson who remembered destroying some of Wilson's old records on an unspecified date.

Of the oil companies supporting Wilson the Texas Company is engaged in producing petroleum at various oilfields in Colorado, Montana, Wyoming, Nebraska, and North Dakota. In this area the petroleum is shipped by the purchasers. At the well site or in the field, the petroleum is subjected to a so-called heater-treater process in which heat of from 100 to 180 is applied to separate the basic sediment, gas, and water content from the oil so that the latter will meet specifications of the pipeline companies prerequisite to transportation. According to the superintendent of drilling and production for this concern, the oil which is shipped to the refinery after application of the heater-treater process is called oil or petroleum. The Pure Oil Company purchases the commodity referred to by its purchasing manager as "crude oil." This is oil which remains after the sediment, gas, and water content have been removed by the heater-treater process. Shipments made by pipeline move direct to its refinery. Tank-vehicle shipments are transported to a pipeline terminal where the crude oil

is injected into the pipeline and moved to the refinery. This company purchases crude oil in northeastern Colorado, western Nebraska, and southeastern Wyoming. The remaining oil company, Utah Oil Refining Company, purchases petroleum with water, gas, and sediment removed by the heater-treater process at well sites in the Ashley Valley Basin, and ships it by tank vehicle to Rangely. Its traffic manager asserts that this commodity is purchased as "crude oil." The company used Nelson to transport a substantial volume of this commodity until January 28, 1952, when it commenced using Wilson for the movement. The change in carriers was made because for over a year Nelson had been unable on occasions to handle the entire output of the wells on the day it was produced. Wilson's service subsequent to January 28, 1952, was satisfactory and dependable.

A professor at the University of Utah, holding a Ph.D. degree in inorganic and physical chemistry from Cornell University, who is head of the Department of Fuel Technology, College of Mines and Mineral Industries of the University of Utah, adduced evidence on behalf of complainant in the title proceeding and in rebuttal in the application proceedings. He asserts that "petroleum is the combination of hydrocarbon and oxygen and sulphur and nitrogen obtaining molecules as it comes from the ground. Petroleum products, on the other hand, are those products derived from petroleum by refinery operations. The material that goes into a refinery will be petroleum or crude oil. The products that come out which have names, gasoline, diesel oil, fuel oil, peroleum wax, etc., are the products of the original petroleum." The witness further expressed the opinion that the residual material left after the water, gas, and basic sediment has been removed by the heater-treater process is crude oil and is so known in the trade usage of these terms.

DISCUSSION AND CONCLUSIONS

The basic issue for consideration is whether or not the terms "liquid petroleum products" and "petroleum products" include crude oil. In this connection the Commission, former division 5, in the *Wilson* case, *supra*, stated:

> With the possible exception of two cases[6] hereinafter discussed, we know of no decision of this Commission which could even be interpreted as holding that authority to transport "petroleum products" includes the right to transport "petroleum" or "crude oil." The Petroleum Dictionary, published by the University of Oklahoma Press, defines crude oil as "Petroleum; designated *crude* to distinguish it from the refined oils manufactured from it." And in the Illustrated Petroleum Dictionary and Products Manual, published by the Petroleum Educational Institute, petroleum is defined as, "Petroleum. Describes crude oil as it comes from the ground in its natural state or when secured from coal shale and other sources." On the other hand, the term "petroleum products" means any and all products derived from petroleum. See *Descriptions in* Motor Carrier Certificates, 61 M.C.C. 209, 265, 266. That we have always made a distinction between a commodity and the products of that commodity is evident from other cases. For example, in *Humes Extension of Operations—Indiana*, 48 M.C.C. 455, the Commission, division 5, concluded that applicant therein, who held authority to transport "wire products," was not authorized to transport "wire," and stated (page 457) that "Wire products describes commodities of a definite type or class, that is, articles made principally out of wire." And in *Vaughan Interpretation of Cer-*

[6] *Classification of Motor Carriers of Property*, 2 M. C. C. 703, and No. MC-9895 (Sub-No. 60), *Wilson Extension-Kansas*, 47 M. C. C. 1005 (not printed in full), decided October 13, 1947.

tificate, 52 M.C.C. 204, the Commission, division 5, in finding that authority to transport "cotton and cotton goods" included authority to transport "cotton yarn," stated (page 205):

"The use of the two expressions 'cotton' and 'cotton goods' shows an intent to grant authority to transport both the raw material and finished products thereof."

At the consolidated hearing herein, Wilson introduced evidence of so-called "grandfather" operations in the movement of crude oil for the purpose of establishing that it intended to seek, and the Commission, division 5, intended to grant, authority in the "grandfather" proceeding which would enable it to transport crude oil. If it is able to establish such intent, it is Wilson's position that it is then incumbent on us to conclude that the description petroleum products includes crude oil or that the certificates held by it in the proceedings involved herein should be amended to include specifically the right to transport crude oil. The "grandfather" evidence, therefore, will be first considered.

In order for Wilson to obtain authority to transport crude oil under the "grandfather" clause of section 206(a) of the act, it is essential for it to establish that it and its predecessor have been engaged on and continuously since June 1, 1935, in the transportation of this commodity from and to the points claimed to have been served. In this connection, the oral evidence of R. B. Wilson and his former truckdriver with respect to the operations from the previously specified Wyoming points to Berthoud and Adams City[7] do not relate to a period subsequent to 1936, and R. B. Wilson admits that such operations were discontinued during that year. The certification by the Perry Petroleum Company is indefir as to origins from which the con-

[7] Located in the Denver, Colo., commercial zone.

sidered traffic moved and relates to a period subsequent to the critical date, June 1, 1935. The statement of the auditor of the Wyoming Highway Department is too indefinite as to points of origin and destination to have any important probative value. Neither the oral nor documentary evidence adduced to establish "grandfather" rights for the transportation of crude oil shows specifically described operations for the period subsequent to 1936 and prior to March 24, 1941, the date the original certificate was issued in No. MC-9895. Commencement of operations after June 1, 1935, for the transportation of crude oil from and to points not served prior to that date obviously would not form a valid basis for a claim of "grandfather" rights. It thus is clear tha Wilson's predecessor, insofar as the record here shows, failed to meet the statutory requirements for the establishment of "grandfather" rights to transport crude oil, and that denial of such authority was warranted. In the circumstances, the intention of Wilson's predecessor to seek authority to transport crude oil is not determinative. The important consideraion is that the evidence does not establish that there was an intention on the part of the Commission, division 5, to authorize the transportation of crude oil in the "grandfather" proceeding.

With respect to the applications involving extensions of operations, the report in the *Wilson* case, *supra*, analyzes the evidence adduced in the original hearings upon which the grants in those proceedings were predicated. In each it was found that no mention was made in the evidence of a need for the transportation of crude oil, except in No. MC-9895 (Sub-No. 65) which will be hereinafter considered separately, and that the prospective movements were between refineries or from refineries, bulk plants, and other distributing points to retail outlets and ultimate consumers. Crude oil moves by tank vehicles from oilfields generally to pipeline terminals and refineries and is not coexten-

sive as to points of origin and destination with the movement of refined petroleum products. The evidence in the so-called extension proceedings affords no basis for a conclusion that there was an intention in the findings therein to authorize the transportation of crude oil.

On exceptions Wilson asserts that it would be astoundingly inconsistent to find that it was not granted authority to transport crude oil in No. MC-9895 (Sub-No. 65) while Nelson in No. MC-105027 (Sub-No. 20) received that authority based upon shipper testimony adduced in Wilson's No. MC-9895 (Sub-No. 65) proceeding and incorporated by reference in Nelson's No. MC-105027 (Sub-No. 20) proceeding. As seen both applications were heard on the same day and both carriers were represented by the same counsel, who signed both applications. Nelson's application requested authority to transport petroleum but Wilson's application did not. Nelson's carrier representative adduced evidence as to the basis for seeking authority to transport crude oil, and evidence was presented by one of the supporting shippers as to need for continuance of service provided by Nelson under temporary authority in the movement of crude oil from Rangely field to Wamsutter, which evidence was pertinent only to Nelson's application. The findings in the Nelson proceeding were made in a report and recommended order which, in the absence of exceptions, became effective by operation of law. In the circumstances, the representation of both carriers by the same counsel, the request for authority to transport petroleum in the Nelson proceeding and the lack of such a request in the Wilson proceeding, and the presence of evidence pertinent to the transportation of crude oil in the Nelson proceeding and the lack of such evidence in the Wilson proceeding, raise serious doubt as to Wilson's intention to seek a right which would include the transportation of crude oil. In view of the facts that there was some evidence

to support the recommended grant of authority to transport petroleum to Nelson and no exceptions were filed thereto, a stay of the recommended order to review the scope of the grant was not warranted. Wilson's contention obviously is not meritorious.

Wilson also cites a number of decisions to show that this Commission, at the time the considered certificates were issued and prior to the date of the report in the *Descriptions* case, *supra*, intended that grants of authority to transport petroleum products included the right to transport crude oil. In this connection, reference is made to the language in *Classification of Motor Carriers of Property*, 2 M.C.C. 703, hereinafter called the *Classification* case, decided August 9, 1937, at page 710, as follows:

> "*Carriers of liquid petroleum products.*—Carriers of liquid petroleum products include those carriers who transport such petroleum products as gasoline and other liquid motor fuel, road oil, crude oil, fuel oil, kerosene, and like products * * *."

The *Classification* case was decided in the formative period of regulation under part II of the Interstate Commerce Act, at which time a need appeared for the grouping of carriers prior to the establishment of safety, accounting, and other regulations. It contains no language which may be fairly construed as making commodity descriptions subject to the definitions set forth therein. See *Coastal Tank Lines, Inc.*, v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289.

Reference is also made to decisions in No. MC-97264 (Sub-No. 1), *Markley Extension—Wyoming*, 52 M.C.C. 876 (not printed in full), decided February 5, 1951, No. MC-106621 (Sub-No. 10), *Bryan Extension—Wyoming*, 47 M.C.C. 1106 (not printed in full), decided October 13, 1947, and No. MC-9895 (Sub-No. 60), *Wilson Extension—Kansas*,

47 M.C.C. 1005 (not printed in full), decided October 13, 1947, wherein authority was granted to transport petroleum products other than crude oil in its natural state. In the latter two proceedings the commodity descriptions in the grants were the same as those in the applications. In all three proceedings recommended orders of examiners and a joint board became effective by operation of law. The so-called exception "other than crude oil in its natural state" is of no value and could well have been excluded from the findings as having no effect. In the absence of exceptions, however, staying of the recommended orders to effect such an exclusion was not warranted. The failure to do so does not constitute a basis for concluding that this Commission intended that a grant of authority to transport peroleum products includes the right to transport crude oil.

Wilson also points out that in the decision in No. MC-105964 (Sub-No. 10) *Houk Extension—Colorado,* 62 M.C.C. 830 (not printed in full), decided June 1, 1954, involving a request for authority to transport petroleum and petroleum products and supported by a number of witnesses including three desiring only the transportation of crude oil, the Commission, division 5, denied the application because of the opposition of a number of carriers holding authority to transport petroleum products. The facts set forth in this decision reveal that one of the three witnesses was transporting crude oil in private carriage and the other two sold their crude oil at the wells and the purchaser arranged for truck transportation. None of the three evinced a knowledge of existing transportation service. The denial of this portion of the application appears to have been predicated upon failure of the witnesses to establish a need for this proposed service. Wilson also refers to a denial of a request for authority to transport petroleum and petroleum products in No. MC-2392 (Sub-No. 9), *Wheeler Transport Service, Inc., Extension—Nebraska,* 62 M.C.C. 821 (not

printed in full) decided July 30, 1954, a case in which the only opposition was by a motor carrier authorized to transport petroleum products. However, the shippers referred to in that decision, except one which opera[illegible] in private carriage, only wanted the applicants service for the distribution of refined petroleum products. In a decision cited by Wilson in No. MC-101349 (Sub-No. 15), *O'Boyle Extension —Petroleum Products*, 44 M.C.C. 841 (not printed in full), decided September 7, 1945, there is a reference to refined petroleum products as "petroleum traffic." In another decision, *Dugan Extension of Operations—Nebraska Points*, 26 M.C.C. 233, there is a reference to refined petroleum products as "petroleum." These expressions are not used interchangeably with the term "petroleum products" throughout the reports and constitute nothing more than isolated instances of loose expression. In No. MC-105221 (Sub-No. 1), *Slater Common Carrier Application*, 44 M.C.C. 849 (not printed in full), decided October 18, 1945, the applicant was granted authority to transport petroleum products (other than liquefied gases in bulk, in tank trucks, (1) from Wickett, Tex., to points in six New Mexico counties and (2) from points in Lea County, N. Mex., to Wickett, over irregular routes. The evidence supporting the grant from points in Lea County, involving a back-haul movement, pertained to the transportation of crude oil. This small grant apparently resulted from an oversight or mistake, and considering the large number of decisions which have been rendered involving the transportation of petroleum and petroleum products, does not establish that the views in the *Wilson case*, previously set forth herein, are inconsistent with precedent.

After a consideration of the evidence and the decisions relied upon by Wilson, we are unable to conclude that in grafting authority to transport liquid petroleum products and petroleum products in the applications here involved,

there was an intention to include the right to transport crude oil. The contention of Wilson that oil as it comes from the ground which has been subjected to the heater-treater process is a petroleum product remains for consideration. In this connection, we are impressed by the oral evidence adduced by the expert witness presented by Collett, who is familiar with all phases of the oil indusry, that the term crude oil refers to the material which goes into a refinery; that petroleum products are the products derived from such crude oil by refinery operations; and that crude oil subjected to the heater-treater process is still crude oil as known to the trade. Representatives of two of the three oil companies supporting Wilson admitted that they purchase oil which has been put through heater-treaters as crude oil. In the circumstances, we conclude that there is no merit in Wilson's contention that the commodity in question is a petroleum product.

It is clear from the foregoing that the evidence did not warrant the granting of authority to transport crude oil in the application proceedings which are the subject of this report, and that Wilson does not hold such authority. It is noteworthy, however, that in the No. 9895 (Sub-No. 83) proceeding, the Commission, division 1, found that public convenience and necessity required Wilson's service in the transporation of crude petroleum from and to all points, with one exception, served by it in the transportation of this commodity since 1951. The only operation not embraced in that grant, i.e., from Julesburg Basin to Northport, has not been performed since 1953.

The operation which is the subject of the complaint proceeding, namely, the movement of "petroleum" from Ashley Valley to Rangely, was discontinued by defendant in 1956. Complainant is now transporting this traffic. No purpose, therefore, would be served by the issuance of a

cease and desist order with respect to this transportation, and the interpretative issue has been decided in connection with the application proceedings involved herein. In the circumsances, we conclude that the complaint in the title proceeding should be dismissed. As seen, the Commission did not vacate the order of February 15, 1956, denying Wilson's petition for reconsideration of the application proceedings by the entire Commission and for oral hearing. Except to the extent that the reopening of these proceedings for oral hearing on the Commission's own motion constiuted a partial grant of the petition, the denial order of February 15 is still in effect and no further action with respect to this petition is necessary.

In No. MC-C-1685, we find that defendant's past operations in the transportation of petroleum between Ashley Valley, Utah, and Rangely, Colo., have been discontinued, and that this complaint should be dismissed.

In Nos. MC-9895, MC-9895 (Sub-No. 1) MC-9895 (Sub-No. 7), MC-9895 (Sub-No. 8), MC-9895 (Sub-No. 53), MC-9895 (Sub-No. 65), MC-9895 (Sub-No. 68), and MC-89058 we find that the terms "liquid petroleum products" and "petroleum products" as used in certificates issued in these proceedings do not include petroleum, and that such certificates at the time of the grant thereof were not intended to authorize the transportation of petroleum.

An appropriate order will be entered.

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No. 503

In the Supreme Court of the United States

OCTOBER TERM, 1960

DENVER CHICAGO TRANSPORT COMPANY, INC.,
APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

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575634—60

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325. That judgment dismissed an action brought by appellant to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission construing the terms "petroleum prod-

ucts" and "liquid petroleum products" as used in various certificates of public convenience and necessity held by appellant as not including petroleum (hereafter "crude oil").

After various administrative proceedings (described in the Commission's opinion, J.S. 44–49), Division 1 of the Commission held (1) that the term "petroleum products" in appellant's certificates does not include crude oil, and (2) that the Commission did not intend, when it originally issued the certificates to appellant's predecessor, to authorize the transportation of crude oil. *Collett Tank Lines v. R. B. "Dick" Wilson, Inc.*, 78 M.C.C. 369 (J.S. 43–64). The Commission reviewed the evidence designed to show that appellant's predecessor had "grandfather" authority to transport crude oil, and that it therefore intended to seek, and the Commission intended to grant, such authority (J.S. 52–54, 57–58). It concluded (J.S. 58), however, that "[n]either the oral nor documentary evidence adduced to establish 'grandfather' rights for the transportation of crude oil shows specifically described operations for the [critical] period * * *," and that "the evidence does not establish that there was an intention on the part of the Commission, division 5, to authorize the transportation of crude oil in the 'grandfather' proceeding." The Commission rejected the contention that certain of its decisions established that "at the time [appellant's] certificates were issued * * * [the Commission] intended that grants of authority to transport petroleum products included the right to transport crude oil" (J.S. 60).

The full Commission denied reconsideration (J.S. 7), and the three-judge district court unanimously sustained the Commission's order. The court ruled (J.S. 30, footnotes omitted):

> After considering the evidence the Commission concluded that in the grant of the authorities here involved there was no intent to include the right to transport crude oil. The construction of a grandfather permit by the Commission is controlling on the courts unless clearly erroneous. Here, there is substantial evidence to sustain the construction by the Commission. Its determination of its own intent cannot be said to be clearly erroneous. That intent is consistent with the literal meaning of the language used.

ARGUMENT

This case involves the narrow issue of the interpretation of appellant's motor carrier certificates. After extensive administrative proceedings, which included consideration of "grandfather" proceedings in which appellant's predecessor received the certificates, the Commission concluded that the term "petroleum products" does not cover crude oil and was not intended at the time of the original proceedings. As this Court has held, the Commission's determination of the scope of its own certificate will be upheld unless it is "clearly erroneous." *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558. The three-judge district court unanimously held that the Commission's construction of its own certificates "cannot

be said to be clearly erroneous" and, therefore, "must stand" (J.S. 30, 31). We submit that this decision is correct, and that this appeal presents no substantial question calling for plenary review by this Court.

Initially, we point out that "the plain meaning of words in a commodity description is controlling in the absence of ambiguity or specialized usage in the trade" (*Nelson, supra,* at 557). Appellant does not contend that there is anything "patently ambiguous" (*ibid.*) in the term "petroleum products"—the commodity description contained in its certificates—or that this phrase "is a term of art" (*id.*, at 558) in the trade which has come to mean crude oil. Indeed, it does not challenge (see J.S. 9) the statement of the district court that "[i]n the ordinary use of the English language there is a distinction between a commodity and the products of that commodity" (J.S. 25–26). Under *Nelson,* therefore, this alone would have been sufficient to sustain the Commission's ruling.

The Commission and the court, however, did not limit their consideration to the language of the certificates. In response to appellant's contention that a broader definition, including crude oil, had been intended by the agency at the time the certificates were issued, the Commission fully considered other Commission decisions and the record in the "grandfather" and subsequent authorization proceedings which, appellant alleged, supported its position. The Commission held, however, that there was no basis

for concluding that other contemporaneous Commission decisions demonstrated an intent to include crude oil within the meaning of the term "petroleum products"; and that neither the "grandfather" proceeding nor the eight subsequent certification proceedings involving the appellant's predecessor showed any such intent. The district court affirmed, finding that "there is no ground for concluding [from analysis of the other Commission decisions] that the Commission intended that a grant of authority to transport petroleum products included the right to transport crude oil" (J.S. 28), and that the Commission's construction of the "grandfather" permit and the subsequent authorizations was supported by substantial evidence (J.S. 30).

Appellant's principal reliance here, as below, is on the so-called *Classification* case (*Classification of Motor Carriers of Property*, 2 M.C.C. 703 (1937)), where the Commission included transportation of crude oil within the classification of "carriers of liquid petroleum products." But, as the district court held (J.S. 26–27), in upholding the Commission on this point (see J.S. 60), "a reading of the entire categorization" of "liquid petroleum products" (which includes "edible oils, coal-tar products, and chemicals," and expressly excludes "transportation of milk, fruit juices, or other perishable liquid products which require temperature control"), shows that the primary intent of the proceeding was, "to set up a grouping for regulation of tank vehicles, not to pro-

vide a definitive commodity description" (J.S. 26–27). Accord, *Carolina Freight Carriers Corp.* v. *United States,* 38 F. Supp. 549, 554 (W.D.N.C.), affirmed, 315 U.S. 475 ("* * * in making classifications of carriers for the proper performance of its [sic] duties, the Commission has not attempted to classify with respect to points served or specific commodities hauled, but has defined its seventeen classes of carriers on the basis of the general business engaged in"). See also *Willers* v. *United States,* 133 F. Supp. 270, 272 (S.D.); *Humes Extension of Operations—Indiana,* 48 M.C.C. 455; *Vaughn Interpretation of Certificates,* 52 M.C.C. 204.

Both the Commission (J.S. 60–62) and the district court (J.S. 27–28) recognized that there was some inconsistency in the use of the term "liquid petroleum products" in a number of certificates. But, as the court indicated (J.S. 28), while this inconsistency may have been sufficient to warrant investigation into the specific intent of the grants to appellant's predecessor, the limited number of certificates incorporating language which could be read to indicate an intent to include crude oil within the category of petroleum products, did not involve cases in which the Commission itself had been called upon to consider the coverage of the grant. Accordingly, these cases provided "no ground for concluding that the Commission [here] intended that a grant of authority to transport petroleum products included the right to transport crude oil" (*ibid.*).

Nor is there any merit to appellant's attack upon the Commission's analysis of the "grandfather" proceeding and the eight extension applications which followed it. Appellant does not really challenge the Commission's conclusion that, regardless of the *applicant's* intent, there was no showing made in those proceedings to justify the grant of authority to carry crude oil, or other indication that the *Commission* intended to authorize such carriage. Instead, it appears to argue (J.S. 17–19) that the evidence at the reopened hearings in those proceedings was insufficient to support an affirmative conclusion by the Commission that appellant's certificates, at the time they were issued, "were not intended and understood to authorize the transportation of crude oil" (J.S. 19). This misses the point. Since the language of the certificates in its normal usage admittedly would not include "crude oil," the purpose of resort to the earlier authorization proceedings was to give appellant an opportunity to show, as it clearly has not, that the Commission in making the awards intended to authorize the broader coverage. *Nelson* v. *United States, supra,* at p. 557. In any event, as the court below held (J.S. 30), there was "substantial evidence" to support the Commission's conclusion that in granting these authorizations it had not intended to include a right to transport crude oil, and

that this "determination of its own intent cannot be said to be clearly erroneous."[1]

Where a statutory three-judge court, as here, has confirmed a Commission construction of the intended scope of the certificates, further plenary review by this Court is seldom, if ever, warranted. See *Sims Motor Transport Lines, Inc.* v. *United States*, 362 U.S. 637, affirming 183 F. Supp. 113 (N.D. Ill.); *Burlington-Chicago Cartage, Inc.* v. *United States*, 362 U.S. 401, affirming 178 F. Supp. 857 (S.D. Ill.). Cf. *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401; *Nelson* v. *United States of America, supra.* Here, as in *Nelson* (355 U.S., at 560), "we are compelled to think the Commission right; certainly it is not clearly wrong."

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[1] Appellant, while attacking the district court's use of the clearly erroneous test, appears to agree it "did not unduly prejudice Appellant" (J.S. 20). In any event, the purported distinction between an "interpretation" of a certificate (to which the clearly erroneous test would be applicable under *Nelson, supra*) and findings of fact which must be supported by substantial evidence, breaks down because, contrary to appellant's contention (J.S. 21), the district court did find that there is substantial evidence to support the Commission's findings (see J.S. 30). Appellant also argues that the Commission here has in effect revoked its certificated rights without following the procedure specified in 49 U.S.C. 312(a). But this Court has made clear that "Commission interpretation of the meaning of a permit, being simply a definitive declaration of what rights existed from the very beginning under the permit, cannot be equated with modification, * * * unless found to be clearly erroneous." *Andrew G. Nelson, Inc.* v. *United States, supra*; 355 U.S. at 558–559, n. 4; see also, *Jones Truck Lines* v. *United States*, 146 F. Supp. 697, 703 (W.D. Ark.); *Willers* v. *United States, supra.*

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. The judgment of the district court should be affirmed.

Respectfully submitted.

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OCTOBER TERM, 1960

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Appellees

ON APPEAL FROM THE
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FOR THE DISTRICT OF COLORADO

BRIEF OF APPELLANT OPPOSING MOTION TO AFFIRM.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 503

DENVER CHICAGO TRANSPORT COMPANY, INC.,
Appellant,
vs.
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION
Appellees
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF OF APPELLANT OPPOSING MOTION TO AFFIRM

As provided for by Rule 16 of the Revised Rules of this Court, Appellant submits this brief in opposition to the motion of the United States of America and the Interstate Commerce Commission[1] to affirm the judgment of the District Court.

STATEMENT

The opinion of the United States District Court for the District of Colorado from which this appeal is taken and the involved decisions and orders of the Interstate Commerce Commission reviewed in the Court below are reproduced in the Jurisdictional Statement (J.S.). The Jursdictional Statement also sets forth the questions presented by the appeal and the statutory grounds conferring jurisdic-

[1] Hereinafter sometimes referred to collectively as the Government.

tion in this Court, together with authorities sustaining such jurisdiction. The Government has not challenged the jurisdiction of this Court in the appeal.

Appellant has fully summarized the relevant facts of the case in its Jurisdictional Statement. That statement is relied upon in this brief. The facts as stated by the Government in its Motion to Affirm are not in substantial disagreement. In characterizing the proceedings before the Commission, however, the Government does not clearly disclose the significant fact that in *Collett Tank Lines v. R. B. "Dick" Wilson, Inc.*, 78 M.C.C. 369,[2] the Commission, on its own motion, reopened all the proceedings in which Appellant acquired its certificates for consolidated oral hearing and the reception of evidence going to the issues involved in the interpretation of Appellant's operating authority.

In this brief, Appellant respectfully requests that the Court also consider the arguments presented under that portion of the Jurisdictional Statement entitled "The Questions Are Substantial." An effort will be made herein only to join issues on specific contentions raised by the Government in its Motion to Affirm, and to supplement, where applicable, the argumentative portion of the Jurisdictional Statement.

SUMMARY OF ARGUMENT

The commodity description "petroleum products" in Appellant's certificates of public convenience and necessity must be interpreted in the light of an official, specialized usage of the term by the Commission and the motor carrier industry during the period when the certificates were issued. This is not a case to be government by the plain meaning of words in the English language, nor abstract distinctions between a commodity and its products.

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[2] Jurisdictional Statement, Appendix "C".

CRUDE OIL WAS DEFINITIVELY CLASSIFIED BY THE COMMISSION AS A PETROLEUM PRODUCT DURING THE PERIOD IN WHICH APPELLANT ACQUIRED ITS CERTIFICATES

During the period in which Appellant's operating rights were issued the Commission had definitively classified crude oil as a petroleum products for the purpose, among others at least, of describing the scope of commodity authorizations to be contained in certificates. This classification was made in an *ex parte* rule making proceeding after careful consideration and extensive conferences with members of the motor carrier industry. The classification was subsequently published as an official Motor Carrier Regulation of the Commission. Thereafter, during the years in which Appellant's certificates were granted, the Commission, in numerous decisions and orders, applied the classification as definitive of commodity authorizations. The Commission's present interpretation of Appellant's authorization to transport petroleum products as excluding the transportation of crude oil is manifestly contrary to its own definitive classification and official regulation. Therefore it is clearly erroneous.

IN OFFICIAL COMMISSION USAGE CONTEMPORANEOUS TO THE ISSUANCE OF APPELLANT'S CERTIFICATES CRUDE OIL WAS REGARDED AS A PETROLEUM PRODUCT

Entirely apart from the official classification of crude oil as a petroleum product, numerous other decisions and orders of the Commission disclose that, at the times when Appellant's certificates originated, crude oil was regarded by the Commission as a petroleum product. Those decisions and orders, together with the official language employed in other certificates, establish that the generic description "petroleum products" had a specialized meaning within

the motor carrier industry which included the commodity crude oil. In issuing Appellant's certificates for the transportation of petroleum products, the Commission intended to authorize the transportaton, among other commodities, of crude oil, and its conclusion now to the contrary is clearly erroneous.

THERE IS NOT SUBSTANTIAL EVIDENCE OR A RATIONAL BASIS IN THE RECORD TO SUPPORT THE FINDING OF THE COMMISSION THAT APPELLANT'S CERTIFICATES WERE NOT INTENDED TO AUTHORIZE THE TRANSPORTATION OF CRUDE OIL

The determination of the Commission's intent in utilizing the description "petroleum products" in Appellant's certificates cannot be made by an atomization of the evidence in the "grandfather" and other underlying authorization proceedings in an attempt to show that Appellant did not establish a basis for a grant of specific crude oil operating authority. The evidence in this proceeding, and other factors improperly treated by the Commission as evidence, do not afford a substantial or rational basis for the finding that Appellant's certificates were not intended to authorize the transportation of crude oil. Neither the technical dictionary definitions nor the allegedly expert testmony relied upon by the Commission were related in time to the issuance of Appellant's certificates or to usage of the phrase "petroleum products" in the motor carrier industry. They are therefore irrelevant and of no probative value in this proceeding.

ARGUMENT

As a preliminary matter, it is wholly incorrect to assume, as does the Government in its Motion to Affirm (Motion, 4), that this is a case to be controlled by any language

in *Andrew G. Nelson, Inc. v. United States et al*, 355 U.S. 554, 78 S. Ct. 496, 2 L. Ed. 2d 484 (1958). It is conceded that in the interpretation of a certificate of public convenience and necessity, "the plain meaning of words in a commodity description is controlling in the absence of ambiguity or specialized usage in the trade."[3] Also, as is fairly stated by the Government, Appellant does not contend that there is anything *patently* ambiguous in the certificates under scrutiny. But there the concessions must cease. Appellant does most strongly urge that at the times when the involved certificates were issued the specialized usage of the phrase "petroleum products" by the Commission and the motor carrier industry clearly established that crude oil was then regarded as a petroleum product. Indeed, Question Number II of the questions presented by this appeal (J.S. 3) is concerned solely with the issue of "specialized usage" or a "term of art" within the meaning of the *Nelson* case. By reference to contemporaneous official proceedings before the Commission, other certificates of public convenience and necessity, and the Commission's own rules and regulations, it will be shown that, whatever the ordinary or the present meaning of "petroleum products" may be, during the period when Appellant acquired its certificates crude oil was considered a petroleum product within the motor carrier industry. It is fundamental, of course, that language in a certificate will be construed in light of how it was understood at the time the certificate was issued. *United States et al v. Seatrain Lines, Inc.*, 329 U.S. 424, 429, 67 S.Ct. 435, 91 L. Ed. 396 (1947) and cases cited in Jurisdictional Statement, page 10.

With apparent reference to Appellant's statement that its arguments are not based on semantical grounds (J.S. 9), the Government asserts that the distinction in ordinary English usage between a commodity and its product is

[3] *Nelson, supra*, at 557.

therefore unchallenged (Motion, 4). The short answer, of course, is that we are not here concerned with ordinary English usage, but rather with the meaning of the phrase "petroleum products" as used and intended by the Commission and the motor carrier industry when Appellant's certificates were granted. As will be made clear in this brief, the Commission never construed the commodity description "petroleum products" to exclude crude oil until long after Appellant acquired its certificates. Instead, in numerous decisions and orders, the Commission made clear that it regarded crude oil as included in the "petroleum products" description.

Finally, and perhaps the most cogent reason why the ordinary English language rationale is inapplicable to this case, is the fact that the Commission, exercising its rule making function, had definitively classified crude oil as a petroleum product during the period when Appellant's certificates were issued. It is to this point, presented in Question I of the Jurisdictional Statement, that attention will now turn.

CRUDE OIL WAS DEFINITIVELY CLASSIFIED BY THE COMMISSION AS A PETROLEUM PRODUCT DURING THE PERIOD IN WHICH APPELLANT ACQUIRED ITS CERTIFICATES.

On August 9, 1937, prior to the issuance of any of Appellant's certificates, the Commission, Division 5, in *Ex Parte* No. MC-10, *Classification of Motor Carriers of Property*, 2 M.C.C. 703, 709-714, classified the operations of motor carriers with reference to seventeen "Types of Groups of Commodities" transported. The fourth such commodity group was defiined:

> "(4) *Carriers of liquid petroleum products.*—Carriers of liquid petroleum products include those carriers

who transport such petroleum products as gasoline and other liquid motor fuel, road oil, *crude oil*, fuel oil, kerosene, and like products in tank vehicles or drums . . . ." (Emphasis added)[4]

As has been pointed out in the Jurisdictional Statement and authorities cited therein the *Classification* case was an exercise of the Commission's rule-making authority (J.S. 11). The commodity classifications set forth therein were published verbatim as official Motor Carrier Regulations in the *Federal Register* and codified in the *Code of Federal Regulations* as regulations of "general applicability and legal effect", and as such are fully binding upon the Commission (J.S. 11, 12).

In the reopened proceedings below, Division 1 of the Commission held (J.S. 60) that the *Classification* case was decided in the formative period of motor carrier regulation, at which time a need was apparent for the grouping of carriers prior to the establishment of safety, accounting, and other regulations, and the case contains "no language which may be fairly construed as making commodity descriptions subject to the definitions set forth therein." The District Court upheld the Commission on this point (J.S. 26, 27), adding that a reading of the entire categorization of commodity group (4), which includes "edible oils, coal-tar products, and chemicals," and specifically excludes certain "perishable liquid products which require temperature control," indicates that the Commission intended to provide for the regulation of tank vehicles, rather than to provide a definitive commodity description.

But the intention of the Commission in the *Classification* case cannot be determined from a reading of the petroleum products commodity group alone, and completely contrary to the conclusion of the Commission, there is in-

[4] 2 M.C.C. 703, 710.

deed much in the language of that case which, fairly construed, compels the conclusion that certain generic commodity descriptions were intended to be expressed in the classifications. The Commission itself stated the following as one of the purposes to be served by the classifications:

> "It is obvious that such classification is particularly important at this time in connection with the *issuance of certificates*, permits and licenses, as it will *facilitate the identification and description of the operations to be covered thereby.*" (Emphasis added)[5]

Much in the same vein, the Commission, in expounding the purposes to be served by the *Classification* case, was "impressed" with the necessity of providing a "satisfactory operating sphere for each kind and major type of operator now in existence."[6] In explanation of the seventeen "Types of Groups of Commodities," the Commission stated:

> "The third division on the chart describes the type of commodities transported by the carrier."[7]

A reading of the *Classification* case in its entirety fully justifies the conclusion that at least one of the purposes of the Commission was to describe the generic commodity authorizations to be issued to the several classes of carriers defined. This conclusion is not impaired in the least by the possibility that the Commisson may have acted also in response to a then apparent need for a classification of carriers prior to the establishment of safety, accounting, and other regulations. The two purposes would not seem at all incompatible. Significantly, the Government now appears to take the position that the "primary" purpose of the case was to provide for such regulation (Motion, 5), but

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[5] 2 M.C.C. 703.
[6] 2 M.C.C. 703.
[7] 2 M.C.C. 706.

that contention does not in any manner deny that the scope of certain general commodity descriptions was also defined.

During the period in which Appellant acquired its certificates, the *Classification* case was relied upon in numerous Commission decisions for the purpose of describing or defining the scope of commodity authorizations. Rather than burden this brief with extensive citations, a chronological list of such decisions, intended to be neither exhaustive nor selective, has been appended hereto as Appendix A. All of the cases cited in the Appendix are related in time to the proper interpretation of Appellant's certificates and reflect instances in which the Commission applied the *Classification* case as definitive of the commodities embraced within a particular commodity description or determinative of a particular type of carrier service. One of those cases, *Consolidated Freight Lines, Incorporated, Common Carrier Application*, 11 M.C.C. 131, warrants special attention here since it contains specific references to the petroleum products classification and discloses the reliance of both the Commission and the motor carrier industry on that particular generic commodity definition.

> "Commodities.—Based upon the carrier designations set out in Classification of Motor Carriers of Property, 2 M.C.C. 703, applicant seeks a certificate authorizing it to operate as a common carrier of property. . . It requests authority to transport commodities under group 1, general freight; group 3, heavy machinery; group 4, liquid petroleum products; group 6, refrigerated solid products; group 9, motor vehicles; and group 17, specific commodities not subgrouped, particularly livestock."
>
> • • •
>
> "Although applicant owns and operates tank trucks, no proof was submitted that group 4 commodities,

liquid petroleum products, have been transported therein in interstate or foreign commerce. The authority sought in this respect is therefore denied.'"[8]

The policy of official reliance on the *Classification* case which is evident in the cases cited in Appendix A may, possibly have been brought to an end[9] in *Coastal Tank Lines, Inc. et al v. Charlton Bros. Transportation Company*, 48 M.C.C. 289, decided June 4, 1948.

The dramatic effect of *Coastal Tank Lines* can be best appreciated in connection with a brief review of three other very illuminating Commission decisions involving the effect of the *Classification* case.

In *Watson—Purchase—Comet Motor Express Co.*, 40 M.C.C. 735, decided May 22, 1946, Watson applied to the Commission for authority to purchase certain operating authority from Comet, including a certificate authorizing the transportaton of general commodities, without exceptions, between Craig, Colorado and Casper, Wyoming. Under the agreement of sale, Comet was to retain that portion of its certificated general commodity authority which would, it was thought, allow the transportation of bulk petroleum products between Craig, Colorado and Casper, Wyoming. Athough it noted that Comet had already contracted to sell the purportedly retained petroleum products authority to another carrier, the Commission, invoking

[8] 11 M.C.C. 131, 133, 134

[9] If the *Classification* case is indeed no longer definitive, it retains a surprising vigor as at least "a guide in the issuance of authorities." *Petroleum Carrier Corporation et al v. Black*, 51 M.C.C. 717, 721, 722 (1950). In *Petroleum-Union Cartage Company*, 309 I.C.C. 333, 334, 335, decided January 6, 1960, the Commission noted that the *Classification* case had "established a number of classifications and groupings of motor carriers based on the types of commodities transported." From that springboard, the Commission determined that a particular motor carrier was without authority to transport petroleum products, in bulk, in tank vehicles, for the reason, *inter alia*, that the service of the carrier was that of the type defined in the "carriers of heavy machinery" group of the *Classification* case.

the *Classification* case, held that the unrestricted general commodities authority owned by Comet had never authorized the transportation of petroleum products in bulk. Therefore, if the sale to Watson were consummated, Comet would retain no rights under the certificate.

> "In *Classification of Motor Carriers of Property*, 2 M.C.C. 703, the Commission, division 5, had under consideration the classification of motor carriers of property, and, after discussing the need for such classification, defined 'carriers of general freight' as that group, comprising both common and contract carriers, 'transporting commodities generally, except such commodities as require special equipment or service.' It is apparent that transportation of petroleum products, in bulk, is a specialized service, involving use of a special type of equipment in transporting a limited group of commodities for a particular class of shippers. In our opinion vendor's certificate, authorizing the transportation of general commodities, does not include the right to transport petroleum products in bulk. Accordingly, if the authority herein granted is exercised, all of vendor's rights to operate between Craig and Casper via Rawlins, under its certificate . . . will be acquired by vendee."[10]

In *C & U Tank Lines, Inc.—Purchase Comet Motor Express Co.*, decided October 3, 1946, 45 M.C.C. 175, Comet, the same vendor appearing in the *Watson* case, proposed to sell that remaining portion of its unrestricted general commodity authority which supposedly would authorize the transportaton of petroleum products in bulk, between Salt Lake City, Utah and Craig, Colorado, and between Grand Junction and Craig, Colorado, together with the petroleum products authority between Craig, Colorado and Casper,

[10] 40 M.C.C. 735, 737 - 738.

Wyoming which it had purported to exclude from the sale of general commodities authority in the *Watson* case. Relying on its previous *Classification* case rationale in *Watson*, the Commission dismissed the application, holding:

> "The remainder of the rights granted in No. M.C.-691, to transport general commodities between Grand Junction and Craig and between Salt Lake City and Craig, are subject to the identical lack of authority to transport petroleum products, in bulk, found in the *Watson* case as to the Craig-Casper segment. It follows that Comet holds no authority to transport petroleum products, in bulk, over any of the routes which are the subject of the instant transaction . . ."[11]

Coastal Tank Lines, Inc., et al v. Charlton Bros. Transportation Company, Inc., decided June 4, 1948, 48 M.C.C. 289, involved a complaint proceeding against Charlton alleging the unlawful transportation of petroleum products, in bulk, in tank vehicles, under a certificate authorizing the transportation of general commodities without restriction. Defendant admitted the transportation of petroleum products, but like Comet in the two previous decisions, contended that authority to transport general commodities necessarily included the right to transport petroleum products in bulk. Noting that its previous decisions in *Watson* and *C & U* did not appear reconcilable, the Commission nevertheless held that the definition of carriers of general commodities as set forth in the *Classification* case was not controlling on the certificate of Coastal and dismissed the complaint.

Thereafter, on June 23, 1949, the Commission reopened the proceedings in *C & U Tank Lines, Inc.—Purchase—Comet Motor Express Co.*, for reconsideration, and expressly modified its prior findings to conform with the

[11] 45 M.C.C. 175, 180-181.

decision in *Coastal Tank Lines*, holding that Comet's general commodity certificate did authorize the transportation of petroleum products in bulk.[12]

In the Government's Motion to Affirm, *Carolina Freight Carriers Corp. v. United States et al* (D.C., N.C. 1941) 38 F. Supp. 549, is cited as being in accord with the contention that the "primary" purpose of the "liquid petroleum products" grouping in the *Classification* case was not to provide a then definitive commodity description of petroleum products (Motion 5, 6). A brief analysis will show that the language of the case quoted by the Government (Motion, 6) is not only inapplicable, but when read in full context actually supports the position of Appellant.

Carolina Freight Carriers Corp. had applied to the Commission for a "grandfather" certificate authorizing the transportation of general commodities. After hearing the Commission issued a certificate, but restricted it to transportation of a few specific commodities and to service to and from certain points within the scope of the application. The Commission sought to justify the restrictions imposed, among other grounds, on the basis of the definition of a common carrier contained in 49 U.S.C. Sec. 303 (a) (14). The District Court disagreed, stating that the effect of the definition was merely to make clear that both "specialty" and "general" carriers were common carriers, and then added:

> "And we think it significant that in making classifications of carriers for the proper performance of its duties, the Commission has not attempted to classify with respect to points served or specific commodities hauled, but has defined its seventeen classes of carriers on the basis of the general business engaged in. The classification is as follows: (1) carriers of general

[12] 55 M.C.C. 791, 792.

> **[illegible] of [illegible] Under this [illegible] classified as a carrier of general freight, since it was willing to haul any freight that it was offered, outside of the specialties requiring specialized equipment, and did substantial business of this character. *Being a common carrier of general freight during the 'grandfather' period, it became entitled to a certificate on the same basis;* and we see nothing in any language of the act which justifies the Commission in limiting the certificate to the points served and the specific commodities transported." (Emphasis added)[13]**

In reversing the Commission, the Court, in *Carolina Freight Carriers*, employed the *Classification* case in a manner precisely opposed to the Government's view in the instant proceeding. As a "significant" factor, the Court in the cited case found that the plaintiff should manifestly be classified as a carrier of "general freight", as defined in the *Classification* case, and therefore should be entitled to a certificate *on the same basis*, namely general freight. By logical extrapolation of the reasoning in *Carolina Freight Carriers*, Appellant here is manifestly a carrier of "petroleum products," as defined in the *Classication case*, and should therefore be entitled to an interpretation of its certificates on that basis, which, so construed, would give it authority to transport crude oil. The *Carolina Freight Carriers* case was affirmed by this Court, 315 U.S. 475, 62 S. Ct. 722, 86 L. Ed. 971 (1942). Although the *Classification* case was not explicitly relied upon, this Court, at page 433, did state that the Commission may not atomize, product by product, the "grandfather" service of a carrier of a whole "class or classes of property."

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[13] 38 F. Supp. 549, 554.

The Government's reliance on *Willers v. United States* (D.C., S.D., 1955) 133 F. Supp. 270 (Motion, 6) is only somewhat less puzzling. There the District Court pointed to the fact that in the *Classification* case the Commission had classified motor carriers of property according to, among other things, the "type of commodities transported" (133 F. Supp. 270).

Enough has been said to establish that during the period from 1937 through 1948, at least, there existed in the motor carrier field a definitive classification of crude oil as a petroleum product. Shading its conclusion to the contrary, the District Court admitted that "doubt is cast upon" its conclusion by "numerous references which the Commission has made to the *Classifications* case when considering commodity descriptions" (J.S. 27). In the view of the District Court, the matter was "further complicated" by the stature of the commodity classifications as an official Motor Carrier Regulation of the Commission (J.S. 27). Significantly, that complication, entailing as it does all of the law concerning the binding effect of administrative regulations discussed at pages 11 and 12 of the Jurisdictional Statement, was never resolved by the District Court (J.S. 27), and remains, in our opinion, a basic invalidity in the opnion of the Court. Manifestly, the Commission having interpreted Appellant's certificates contrary to its own controlling definition of petroleum products, that construction is clearly erroneous.

IN OFFICIAL COMMISSION USAGE CONTEMPORANEOUS TO THE ISSUANCE OF APPELLANT'S CERTIFICATES CRUDE OIL WAS REGARDED AS A PETROLEUM PRODUCT

A careful and extensive reading of Commission decisions involving motor carrier applications in the period during which Appellant acquired its certificates leads in-

escapably to the conclusion that both the Commission and the motor carriers then consciously regarded crude oil as a petroleum product.

Perhaps the strongest evidence that the commodity description "petroleum products" was actually intended to include crude oil is found in the language of the *Classification* case. There, following extensive conferences with the motor carrier industry and after painstaking study and refinement in expression,[14] the Commission described "carriers of liquid petroleum products" as carriers who transport "*such petroleum products as . . .* crude oil."[15] Thus, whether or not the Commission intended the *Classification* case to be definitive of commodity descriptions generally, the fact remains that crude oil was therein specifically regarded as a petroleum product. That usage is very carefully and unequivocally stated in the language employed by the Commission.

Commission usage of the term petroleum products as inclusive of the commodity crude oil is demonstrably evident in other decisions rendered during the period spaning the dates when authority was granted to Appellant. In one such class of cases, the Commission granted "petroleum products" authority based upon an established need for crude oil transportation, or to be same effect, granted a certificate for the transportation of crude oil where the application was for petroleum products.[16] These cases cannot be reconciled with the present position of the Government, since if crude oil was not then regarded as a petroleum product, the authority granted in either instance would have been beyond the scope of the application and therefore void.

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[14] 2 M.C.C. 703, 706.

[15] 2 M.C.C. 703, 710, emphasis added.

[16] Decisions cited at page 15 of Jurisdictional Statement, note 21.

Another class of cases which clearly establishes that the Commission understood crude oil to be a petroleum product is that in which certificates were granted authorizing the transportation of "petroleum products other than crude oil," or "petroleum products other than crude oil in its natural state."[17] In the proceedings below the Commission brushed aside these cases by noting that they had all involved recommended orders of examiners or a joint board which had become effective by operation of law, and holding; further, that the exception "other than crude oil in its natural state" was of no value and could well have been excluded from the certificates as having no effect (J.S. 61). The Government has adopted the same position (Motion, 6). There is no doctrine of which we are aware to support the tacit assumption that operating rights resulting from an examiner's recommended order which by operation of law[18] became effective as the order of the Commission are "second-class" certificates. Even if the theory might have some logical validity with respect to the casual terminology of an examiner's opinion in a recommended order, it fails utterly when tested against the Congressional mandate that the actual certificate issued to a motor carrier shall "specify the service to be rendered."[19] The issuance of a certificate is the culmination of the administrative function invested in the Commission. In no other phase is greater clarity and finality in the use of terminology demanded. The Commission itself has often recognized that certificates issued "should state clearly and unequivocally the service which may be performed." *Campbell Sixty-Six Express, Inc., et al v. Frisco Transportation Company, et al*, 46 M.C.C. 222. The definiteness and certainty traditionally required of words used in a statute applies equally to the language of a certificate.

[17] Cases collected, Jurisdictional Statement, page 15, note 22.
[18] 49 U.S.C. Sec. 17 (5).
[19] 49 U.S.C. Sec. 308.

It is a generally accepted rule of statutory construction that an exception of a particular thing from general words displays an intention that the thing excepted would otherwise be included within the general description.[20] The normal practice of the Commission has conformed with this rule of construction. For example, in *Home Transportation Company, Inc., Extension*, (not officially reported), 12 F.C.C. 34,178 the Commission refused specifically to except doors from the commodity description "lumber", "because to do so would imply that they would otherwise be included." Cases in which authority was granted for the transportation of "petroleum products other than crude oil" should therefore, even to the Commission, imply that, absent the exclusionary language, authority to haul crude oil would have been granted in a petroleum products certificate.

A third class of cases showing that crude oil, or petroleum, was normally considered a petroleum product in official Commission usage is that in which the transportation of "refined petroleum products" was authorized. Of the large number of such cases related in time to the issuance of Appellant's certificates, a random sampling has been set forth chronologically in Appendix B. Plainly, the qualification "refined" attached to the description "petroleum products" was intended to exclude the transportation of natural or crude petroleum from the authority granted. If as the Commission found (J.S. 63), petroleum products were then regarded as the products derived from a refinery, the "refined petroleum products" terminology in certificates would be wholly redundant, inconsistent, and confusing. More plausibly, "petroleum products" was a description which included crude oil in the then prevailing usage, and "refined petroleum products" was merely

[20] 82 C.J.S. Statutes, Sec. 382.

another way in which the Commission logically described petroleum products other than crude oil.

Many of the other decisions of the Commission dealing with the issuance of petroleum products authorities contemporaneous with those issued to Appellant support the theory that the Commission during that period used the terms petroleum products and petroleum interchangeably.[21] These cases jibe with those previously discussed in which the Commission affirmatively included crude oil as a petroleum product, and negatively, so to speak, indicate that no general distinction between petroleum and its products was then recognized in issuing certificates.

In *Descriptions in Motor Carriers Certificates*, Ex Parte No. MC-45, 61 M.C.C. 209, decided October 20, 1952, the Commission, for the first time, differentiated between petroleum and petroleum products in commodity descriptions. In doing so, the Commission stated that its findings would apply only to future certificates. (61 M.C.C. 209, 210) All of Appellant's certificates predate the *Descriptions* case. In reaching its result in the present case, therefore, the Commission has attempted to give retroactive effect to a change in policy that was specifically intended to operate only prospectively. To say that the Commission has merely interpreted the rights which Appellant possessed from the beginning is a mere *gratis asseritur*. No decision relevant in time to Appellant's certificates supports such an assertion. On the other hand, the interpretation of the Commission is squarely at odds with its own definitive decisions and regulations and the meaning which it clearly attached to the term "petroleum products" prior to the *Descriptions* case. As such, its interpretation is clearly erroneous.

[21] See, for example: *Hutchinson Transportation Company Common Carrier Application*, 19 M.C.C. 433; *Ellington Brothers, Limited, Common Carrier Application*, 10 M.C.C. 142; *Dugan Extension of Operations — Nebraska Points*, 26 M.C.C. 233.

Being so, it has effectuated the same sort of unlawful revocation of operating rights condemned in *United States et al v. Seatrain Lines, supra.*

THERE IS NOT SUBSTANTIAL EVIDENCE OR A RATIONAL BASIS IN THE RECORD TO SUPPORT THE FINDING OF THE COMMISSION THAT APPELLANT'S CERTIFICATES WERE NOT INTENDED TO AUTHORIZE THE TRANSPORTATION OF CRUDE OIL

The issue as to the substantiality of evidence to support the Commission's finding that Appellant's certificates, at the time of the grant thereof, were not intended to authorize the transportation of crude oil (J.S. 64) is apparently in need of further clarification. The Government's argument tends still, as happened in the opinions of the Commission (J.S. 57-59) and District Court (J.S. 28-30), to obscure the real pertinence of the evidence in the reopened proceeding before the Commission. The question presented is not whether there was evidence in the underlying "grandfather" and extension proceedings which would have warranted a specific grant of crude oil authority to Appellant. Contrary to the Government's apparent understanding of the case, Appellant is not concerned with the evidence in the earlier "authorization proceedings." (Motion, 7) Rather, the issue is whether the evidence introduced in this proceeding before the Commission affords substantial support for the conclusion that the authority acquired by Appellant was not then intended to authorize the transportation of crude oil. Stated differently, the inquiry here is simply whether the evidence of record adequately supports the conclusion of the Commission, affirmed by the District Court, that crude oil was not *regarded* as a petroleum product when Appellant's authority was granted. If it was so regarded, then whether there was

specific evidence in the underlying proceedings to sustain an authorization to transport crude oil is irrelevant, and Appellant should now be entitled to transport all petroleum products, including crude oil. *United States et al v. Carolina Freight Carriers Corp., supra.*

The affirmative evidence, and past decisions of the Commission apparently treated as evidence, relied upon by the Commission, may be summarized as follows: (1) the definitions of crude oil contained in two technical dictionaries (J.S. 56); (2) the purportedly expert testimony of the difference between crude oil and petroleum products in the oil and gas industry (J.S. 63); (3) a definition of petroleum products quoted from the *Descriptions case* (J.S. 56); and (4) two decisions alegedly standing for the proposition that the Commission has always recognized the difference between a commodity and its products (J.S. 56). These factors will be considered briefly in the order stated.

There is not a proper foundation in the record for consideration of the Petroleum Dictionary definitions by the Commission. The dictionaries themselves are extra-record matter, neither introduced into evidence nor officially noticed by the Commission at the time of the hearing so as to afford Appellant an opportunity to cross-examine, explain or rebut their contents or validity. Under the circumstances, resort to these publications by the Commission as affirmative evidence was improper and prejudicial.

Normally, technical dictionary definitions are not persuasive in determining the meaning of a commodity descriptions in certificates issued by the Commission. *Scott Truck Line, Inc. v. United States* (D.C., Colo., 1958), 163 F. Supp. 118. It is the usage intended by the Commission, rather than the abstract meaning of words, which properly governs the interpretation of a certificate. *Salvino v. United States et al* (D.C., Wash., 1954), 119 F. Supp. 277. In *Black*

v. Interstate Commerce Commission (C.A. 5th, 1948), 167 F.2d 825 resort by the Commission to evidence of the usage of the phrase "machinery and machinery parts" in the motor carrier industry, rather than dictionary definitions, was approved by the Court.

Moreover, there is nothing to indicate that the dictionary definitions of crude oil relied upon by the Commission were related to its own official usage or usage in the motor carrier industry. Instead, the dictionaries, one published by the Petroleum Educational Institute and the other a publication of the University of Oklahoma Press (J.S. 56), appear to refer to the meaning of crude oil in the oil and gas industry, a meaning clearly irrelevant in the interpretation of Appellant's certificates. Nor are the dictionaries identified in the Commission's report as to date of publicaton, and there is consequently no basis of knowing whether they are relevant even in point of time to the period when Appellant acquired its certificates. Obviously, the technical meaning of crude oil in the petroleum production and refining industry as of the present or some indeterminate time in the past is of no probative value in the interpretation of the phrase "petroleum products" in the involved certificates.

The Commission relied upon the testimony of a professor-chemist of the University of Utah (J.S. 51), who was "familiar with all phases of the oil industry", and who testified as to the difference between crude oil and its products (J.S. 63). Since this testimony was obviously not related to the usage of terminology in the motor carrier industry, nor to official usage by the Commission, it is subject to the same irrelevancy as the petroleum industry dictionary definitions discussed above. An equal infirmity in the testimony is the fact that it was adduced at a hearing held April 2 and 3, 1957, and no effort was made to relate

the testimony back in time to the period in which Appellant's authority was granted. This lack of proper relevancy of the testimony appears, in fact, on the face of the Commission report itself, where the Commission was "impressed" that the term crude oil "refers" to the material which goes into the refinery (J.S. 63). What the term "refers" to now, or in 1957, is not necessarily what the term *referred* to in the days when Appellant received its certificates.

The inapplicability of the commodity definitions in *Descriptions in Motor Carriers Certificates*, Ex Parte No. MC-45, *supra*, to Appellant's certificates, has already been discussed. Briefly recapitulated, the supposed definition of petroleum products set forth therein was formulated long after Appellant acquired its certificates, and the case, by its own terms, was intended to apply only prospectively to commodity descriptions. Reliance on the *Descriptions* case is therefore not a rational, substantial basis upon which to conclude that Appellant's certficates were not intended to authorize the transportaion of crude oil.

In concluding that crude oil transportation was not intended to be authorized in the grant of petroleum products authority to Appellaat, the Commission relied, finally, on the premise that it had always recognized the difference between a commodity and its products in issuing certificates (J.S. 56, 57). Cited in support of this contention were *Humes Extension of Operations—Indiana*, 48 M.C.C. 455, and *Vaughan Interpretation of Certificate*, 52 M.C.C. 204. The same two cases were the sole authority relied upon by the District Court in stressing the apparent commodity-products dichotomy (J.S. 25, 26), and are cited again in the Government's Motion to Affirm (Motion, 6). Incredibly, however, while the Commission now asserts that it has always seen such a distinction, in the *Descriptions* case,

decided subsequently to both *Humes* and *Vaughan*, and the one decision which everyone concedes was intended to define the scope of certain commodity authorizations, the Commission specifically listed "coal tar" as embraced within the generic description "coal tar products."[22] It should be noted, also, that all but two of Appellant's certificates were issued prior to the *Vaughan* case, and all but three were issued prior to *Humes*. Neither *Vaughan* nor *Humes* involved an interpretation of petroleum products authority.

From the foregoing analysis of evidence in the reopened proceeding before the Commission, it is manifest that the Commission's finding that the grants of petroleum products authorities to Appellant were not intended to authorize the transportation of crude oil is not supported by substantial evidence of record. The factors relied upon by the Commission, unrelated as they are in both time and relevancy to a construction of the certificates involved, do not afford a rational basis for the conclusion made. Lacking a substantial, rational basis in the record, the Commission's affirmative conclusion collapses of its own weight.

[22] 61 M.C.C. 209, 296.

CONCLUSION

On the premises of this brief and the Jurisdictional Statement of Appellant, it is submitted that this appeal presents substantial questions and that plenary review by this Court is warranted. The Government's motion to affirm the judgment of the District Court should therefore be denied, and this Court should note its probable jurisdiction of the appeal.

Respectfully submitted,

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APPENDIX "A"

CHRONOLOGICAL LISTING OF DECISIONS OF THE COMMISSION EXPRESSLY APPLYING THE COMMODITY DESCRIPTIONS AND SERVICE AUTHORIZATIONS OF THE *CLASSIFICATION* CASE AS DEFINITIVE

Classification of Motor Carriers of Property, 2 M.C.C. 703, August 9, 1937.

Dimmick Common Carrier Application, 6 M.C.C. 697, 698, April 18, 1938.

Freer Brothers Motor Express Lines Common Carrier Application, 7 M.C.C. 203, 207, May 16, 1938.

Sweener Common Carrier Application, 9 M.C.C. 77, July 14, 1938.

Nemo Common Carrier Application, 9 M.C.C. 237, 238, July 29, 1938.

Contracts of Contract Carriers, 11 M.C.C. 693, 701, October 24, 1938.

Ruck Common Carrier Application, 12 M.C.C. 150, 152, November 18, 1938.

Holmes Common Carrier Application, 12 M.C.C. 377, 378, November 25, 1938.

Dunn Common Carrier Application, 12 M.C.C. 597, December 1, 1938.

Inman Common Carrier Application, 12 M.C.C. 693, 694, December 8, 1938.

Gerard Motor Express, Incorporated, Extension—Evansville, 9 M.C.C. 627, 630, December 20 1938.

Lundstrom Common Carrier Application, 13 M.C.C. 491, 498, January 6, 1939.

Consolidated Freight Lines, Incorporated, 11 M.C.C. 131, 133-134, January 11, 1939.

Bigsby Extension of Operations—Ohio, 14 M.C.C. 339, 341, February 23, 1939.

Carroll Common Carrier Application, 16 M.C.C. 109, 110, March 6, 1939.

McElhaney Common Carrier Application, 16 M.C.C. 349, 350, March 25, 1939.

Sgers Common Carrier Application, 18 M.C.C. 377, 378, May 6, 1939.

Kane Common Carrier Application, 20 M.C.C. 359, 360, June 19, 1939.

K & L Transportation Company—Purchase—L. C. Chastain, 25 M.C.C. 341, 342, July 7, 1939.

Practices of Motor Common Carriers of Household Goods, 17 M.C.C. 467, 469, 473, 474, July 17, 1939.

Cassens Transport Company, Extension of Operations, 18 M.C.C. 273, September 13, 1939.

Belgea, Extension of Operations—Heavy Machinery, etc., In the Pacific Southwest 24 M.C.C. 745, 747, August 20, 1940.

Langdon Common Carrier Application, 27 M.C.C. 391, 395, January 4, 1941.

Washburn Storage Company, Extension of Operations—Household Goods, 29 M.C.C. 116, 117, May 29, 1941.

Cole Company, Inc. Common Carrier Application, 32 M.C.C. 199, 209, January 1, 1942.

Watson—Purchase—Comet Motor Express Co., 40 M.C.C. 735, 737, May 22, 1946.

Nelson, et al—Control; C and U Tank Lines Inc.—Purchase—Comet Motor Express Co., 45 M.C.C. 175, 180, October 3, 1946.

Coastal Tank Lines, Inc. et al v. Charlton Bros. Transportation Company, Inc., 48 M.C.C. 289, June 4, 1948.

Nelson, et al—Control; C and U Tank Lines, Inc.—Purchase—Comet Motor Express Co., 55 M.C.C. 791, June 23, 1949.

APPENDIX "B"

DECISIONS OF THE INTERSTATE COMMERCE COMMISSION WHERE THE AUTHORITY GRANTED INCLUDED "REFINED PETROLEUM PRODUCTS"

Earl Bray Contract Carrier Application, 1 M.C.C. 167, October 26, 1936.

Edwards Contract Carrier Application, 1 M.C.C. 741, April 22, 1937.

Frei Contract Carrier Application, 3 M.C.C. 299, September 21, 1937.

Thompson, Contract Carrier Application, 4 M.C.C. 283, February 16, 1938.

Peake Oil Company Contract Carrier Application, 6 M.C.C. 83, February 10, 1938.

Schroetlin Contract Carrier Application, 7 M.C.C. 789, June 13, 1938.

Woodrow Brothers Contract Carrier Application, 8 M.C.C. 259, July 22, 1938.

Earl Bray Extension of Operations, 8 M.C.C. 355, July 9, 1938.

Peake Oil Company Contract Carrier Application, 10 M.C.C. 38, October 11, 1938.

Palmer Contract Carrier Application, 11 M.C.C. 734, October 25, 1938.

Collett Common Carrier Application, 11 M.C.C. 789, October 29, 1938.

Baum Extension of Operations, 13 M.C.C. 89, December 23, 1938.

Baum Extension of Operations, 14 M.C.C. 345, May 3, 1939.

Dovel Contract Carrier Application, 14 M.C.C. 357, May 9, 1939.

Harriss Extension of Operations—Oklahoma, 17 M.C.C. 309, June 28, 1939.

Woodrow Brothers Extension of Operations—Wyoming, 17 M.C.C. 329, June 28, 1939.

Kirk Contract Carrier Application, 20 M.C.C. 311, June 15, 1939.

Nichols Extension of Operations—Kansas—Nebraska, 21 M.C.C. 242, December 29, 1939.

Earl Bray Extension of Operations—Kansas—Oklahoma, 21 M.C.C. 601, February 3, 1940.